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v.
George Allen and Dale Jacobsen, etc.

Docketed:
September 18, 1986

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Smith,Clay R.

Counsel for respondent: Pevar,Stephen L.

Entry	Date	Note	Proceedings and Orders
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2	Oct 22 1986		DISTRIBUTED. November 7, 1986
3	Oct 23 1986	X	Brief of respondents George Allen, et al. in opposition filed.
4	Oct 31 1986	X	Reply brief of petitioners Bd. of Pardons, et al. filed.
5	Nov 10 1986		Petition GRANTED.
			**********
6	Dec 24 1986		Joint appendix filed.
7	Dec 24 1986		Brief of petitioners Bd. of Pardons, et al. filed.
8	Jan 29 1987		Record filed.
9	Jan 29 1987		Certified copy of original record and proceedings, 2 volumes, received.
10	Jan 28 1987		Brief of respondents George Allen, et al. filed.
11	Jan 28 1987		Brief amicus curiae of Eugene Newbury filed.
12	Jan 28 1987		Brief amicus curiae of Yale Law School Legal Services, et al. filed.
13	Feb 6 1987		CIRCULATED.
14	Feb 6 1987		SET FOR ARGUMENT. Wednesday, April 1, 1987. (1st case)
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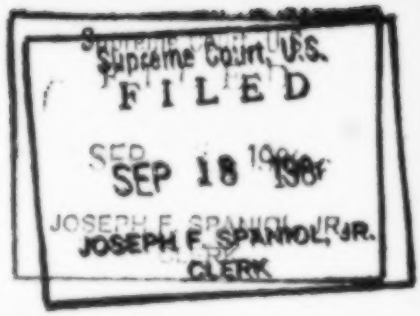
PETITION FOR WRIT OF CERTIORARI

86-461



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86–

BOARD OF PARDONS;
HENRY BURGESS, Chairman,

Petitioners,

v.

GEORGE ALLEN and DALE JACOBSEN,
on their own behalf and on behalf of
all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Mont. Code Ann. § 46–23–201(1) and (2) (1985) creates a liberty interest entitlement in parole release subject to protection under the due process clause of the Fourteenth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 792 F.2d 1404. The opinion of the district court (App. 11a) is not officially reported.

JURISDICTION

The court of appeals' opinion was filed on June 26, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Mont. Code Ann. § 46–23–201(1) and (2) (1985):

> *Prisoners eligible for parole.* (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison or the women's correction center, except persons under sentence of death and persons serving sentences imposed under 46–18–202(2), when in its opinion there is reasonable probability that the prisoner can be

> released without detriment to the prisoner or to the community:
>
> (a) No convict serving a time sentence may be paroled until he has served at least one–half of his full term, less the good time allowance provided for in 53–30–105; except that a convict designated as a nondangerous offender under 46–18–404 may be paroled after he has served one–quarter of his full term, less the good time allowance provided for in 53–30–105. Any offender serving a time sentence may be paroled after he has served, upon his term of sentence, $17^1/_2$ years.
>
> (b) No convict serving a life sentence may be paroled until he has served 30 years, less the good time allowance provided for in 53–30–105.
>
> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law–abiding citizen.

STATEMENT OF THE CASE

The complaint below was filed on May 29, 1984, and requested class certification under Fed. R. Civ. P. 23(b)(1) and (2) on behalf of "all present and future inmates of the Montana State Prison who are now or who may become eligible for parole." (App. 18a.) It asserted jurisdiction under 28 U.S.C. § 1343(3) and alleged three

claims for relief under 42 U.S.C. § 1983: (1) The petitioners "failed to use proper standards for determining [the respondents'] eligibility for parole" in violation of the due process clause of the Fourteenth Amendment; (2) the petitioners "failed to adequately explain the reasons for denying parole" to the respondents in violation of the due process clause; and (3) the petitioners "are causing [the respondents] to suffer more punishment than intended by the [Montana] Legislature in that their applications for parole have not been fairly considered" in violation of the Eighth and Fourteenth Amendments. (App. 18a, 20a–21a.) The principal factual allegations underlying these claims were: (1) the petitioners denied the respondents' parole applications without expressly finding "that they are unable or unwilling to fulfill the obligations of a law–abiding citizen or constitute a detriment to themselves or to the community"; (2) the petitioners failed to make "an individual determination ... of each prisoner's ability to fulfill the obligations of a law–abiding citizen"; and (3) the petitioners failed to utilize proper standards in determining a prisoner's parole eligibility or to explain adequately their reasons for denying parole. (App. 19a–20a.)

The petitioners moved to dismiss the complaint on July 2, 1984. On November 30, 1984, the magistrate recommended dismissal for failure to state a claim. The respondents filed objections to the recommendation, but by memorandum and order dated January 8, 1985, the district

court concurred with the magistrate. The court reasoned that, under *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), it was required to determine the existence of any constitutionally–protected entitlement interest in parole release with reference to Mont. Code Ann. § 46–23–201(1) and (2) (1983).[1] The court then rejected the respondents' contention that such provision established "an expectation of parole" because it utilized the auxiliary verb "shall" in connection with the granting of parole if certain findings were made:

> An examination of the Montana parole provision reveals that vast discretion is vested in the board. The appearance of the word "shall" is misleading at best. The board's discretion is limited only by general reference to considerations such as "the best interests

---

[1] In relevant part, section 46–23–201(1) and (2) provided then, as now:

> (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison or the women's correction center ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community:
>
> ....
>
> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law–abiding citizen.

of society" and "the board's belief that a prisoner is able and willing to be a law–abiding citizen" [*sic*]. The Montana statute lists no factors required to be considered by the parole board. Parole under the Montana system appears largely a judgment call. The court determines that the Montana statutory scheme creates only the possibility of parole, not the entitlement to it. The board itself decides what factors to apply on a case–by–case basis. In the court's opinion, the statute does not provide certain enough guidance to the board to create anything but the mere possibility of release dependent on the board's discretion. Under the *Greenholtz* rule, plaintiffs were not entitled to due process protections in connection with the board's denial of parole. [App. 15a.]

The district court expressly followed *Campbell v. Montana State Board of Pardons*, 470 F. Supp. 1301 (D. Mont. 1979), which had found no protected liberty interest in parole release under section 46–23–201.

The respondents appealed the complaint's dismissal, asserting as the only issue whether a liberty interest in parole release protected under the Fourteenth Amendment was created by section 46–23–201. On June 26, 1986, the court of appeals reversed the district court's judgment and held that the statute did establish such an interest. (App. 3a, 9a–10a.) It reasoned that, in *Greenholtz*, this Court focused upon "the structure of [the Nebraska] statute" which, "[b]y using the word 'shall,' ... mandates parole unless the

Board [of Parole] determines that one or more enumerated reasons exist ... mak[ing] parole unwise in the given case." (App. 4a.) The court found section 46–23–201 "similar in structure to the Nebraska statute" because "[i]t states that the board 'shall' release a prisoner on parole when it determines release would not be harmful, unless specified conditions exist which would preclude parole." (App. 5a.) The court of appeals further stated its conclusion was consistent with the results from other circuits applying *Greenholtz* :

> An examination of decisions in other circuits shows a fairly clear decisional pattern in post–*Greenholtz* decisions considering various state parole statutes. Those state enactments which courts have held do not create a liberty interest do not have mandatory language that parole "shall' be granted when given criteria are met. ...
>
> On the other hand, those state enactments which circuits have held do create a liberty interest generally have contained either a mandatory provision that parole shall be granted when criteria are met, or have expressly created a presumption of eligibility unless certain negative criteria are found. ... [App. 7a] [citations omitted].

The court recognized that the broad standards under the Montana statute vested the petitioners with "great discretion" and thus rested its determination that the statute created a parole–release entitlement protected under the Fourteenth

Amendment solely upon use of "shall...when" in section 46–23–201(1).[2]

REASONS FOR GRANTING WRIT

THE COURT OF APPEALS' OPINION CLEARLY MISCONSTRUES *GREENHOLTZ* AND CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

The court of appeals' opinion is squarely grounded on the notion that, in *Greenholtz*, this Court held a liberty interest protected under the Fourteenth Amendment is created in parole if release is required by state statute when certain conditions are deemed satisfied. However, *Greenholtz* did not so hold but, instead, concluded only that a liberty interest arose under the involved Nebraska statute because it established a *presumptive* entitlement to parole release once an inmate became eligible for consideration. Mont. Code Ann. § 46–23–201(1) and (2), in contrast, directs parole release only when the petitioner Board of Pardons affirmatively determines that various subjective and largely predictive standards are met; consequently, unlike the Nebraska statute, no presumptive entitlement to release

[2]Other courts of appeals have held that criteria substantially identical to those in section 46–23–201(1) and (2) are not sufficiently definite or particularized to establish, in themselves, a protected liberty interest. *Parker v. Corrothers*, 750 F.2d 653, 657 (8th Cir. 1984); *Williams v. Briscoe*, 641 F.2d 274, 277 (5th Cir. 1981); *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979). The only issue presented here is, therefore, whether a liberty interest is established through use of the mandatory "shall."

exists prior to consideration of a particular parole request. The Montana Supreme Court has accordingly held in several decisions that parole under section 46–23–201 is a matter of administrative grace and not one of right. *Cavanaugh v. Crist*, 615 P.2d 890, 895 (1980); *Lopez v. Crist*, 176 Mont. 352, 354, 578 P.2d 312, 314 (1978); *In re Hart*, 145 Mont. 203, 206, 399 P.2d 984, 985 (1965); *State ex rel. Herman v. Powell*, 139 Mont. 583, 589, 367 P.2d 553, 556 (1961). The court of appeals' misapprehension of this critical aspect of *Greenholtz* not only renders its opinion directly at odds with that decision but also places it in conflict with decisions from other circuits.

A. Greenholtz.

Greenholtz involved a class action claim that the Nebraska Board of Parole denied parole–release applicants procedural due process through inadequate hearing and determination policies. The issues were thus whether the class members possessed a liberty interest in parole release protected by the Fourteenth Amendment and, if so, what quantum of due process was required. The Court first concluded the mere possibility of parole existing under a state statute did not create a protected entitlement, thereby rejecting the inmates' reliance on *Morrissey v. Brewer*, 408 U.S. 471 (1972), which held that parole–revocation determinations must satisfy certain due process standards:

> The parole–release decision ... is more subtle and depends on an amalgam of

elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual. ... The [parole–release] decision turns on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." ...

....

That the State holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. ... To that extent the general interest asserted here is no more substantial than an inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process.

442 U.S. at 9–11 (citations omitted; emphasis in original).

The Court then reviewed the terms of the involved Nebraska statute[3] to determine whether it established a protected entitlement interest. The inmates argued, and the Court accepted, a construction of the statute under which the Board of Pardons was required to release on parole an otherwise eligible inmate "unless any one of ... four specifically designated reasons are found. In [the inmates'] view, the statute creates a presumption that parole release will be granted, and that this in turn creates a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists." *Id.* at 12. *See* Respondents' Brief at 24–26, 37–38, *Greenholtz*; Brief of *Amicus Curiae* United States at 31–38, *id.* Nonetheless, the

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[3]Neb. Rev. Stat. § 83–1,114(1) (1976) provided:

> Whenever the Board of Parole considers the release of a committed offender, who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) there is substantial risk that he will not conform to the conditions of parole;
>
> (b) his release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) his release would have a substantially adverse effect on institutional discipline; or
>
> (d) his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law–abiding life when released at a later date.

Court observed that the parole–release statute had not been construed by Nebraska courts concerning "the scope of the interest, if any, the statute was intended to afford to inmates" and emphasized "that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case–by–case basis." *Ibid.*

In *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458 (1981), the Court revisited the scope of *Greenholtz* while finding no protected liberty interest in the commutation of life sentences in the Connecticut penal system. It emphasized that *Greenholtz,* "far from spelling out any judicially defined 'entitlement,' ... did no more than apply the unique Nebraska statute" (*id.* at 463) and concluded by distinguishing the "unfettered discretion" with which the Connecticut Board of Pardons was vested in deciding commutation applications from the "unique mandates of the Nebraska statutes":

> When Nebraska statutes directed that inmates who are eligible for parole "shall be" released "unless" a certain finding has been made, the statutes created a right. By contrast, the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or "entitlement." A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.

Id. at 466–67. *See Olim v. Wakinekona,* 461 U.S. 238, 249 (1983) (where state regulations "place no substantive limitations on official discretion," no liberty interest entitlement established); *Jago v. Van Curen,* 454 U.S. 14, 21 (1981) *(per curiam)* (Ohio "shock parole" statute created no liberty interest); *see also Anderson v. Winsett,* 449 U.S. 1093, 1095 (1981) (White, J., dissenting from denial of petition for writ of certiorari). *Dumschat* makes evident that the liberty interest in *Greenholtz* derived from the presence of a presumptive right to parole release unless certain negative findings were made. Conversely, without such a presumption, the Nebraska statute not only would have lost its "unique" status but also could not have been viewed as creating "a legitimate expectation of release" since, at most, the mere possibility of parole would have existed.[4]

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[4]As observed by Justice Marshall's dissent in *Greenholtz,* 442 U.S. at 29, the Nebraska statute was taken almost verbatim from the Model Penal Code. *See* Model Penal Code § 305.9, *reprinted in* 10 *Uniform Laws Annotated* 629 (1974). No other jurisdiction so clearly patterned its parole–release statute after the model code, and none presently has a presumptive entitlement to parole under a "shall/unless" formulation. In contrast, the United States and several states have parole statutes which closely parallel section 46–23–201(1). 18 U.S.C. § 4206(a); 1986 Ariz. Legis. Serv. 650 (West); Iowa Code § 904.4 (1985); Vt. Stat. Ann. Tit. 28, § 501(a) (1985 Supp). Other provisions are very similar to section 46–23–201(2). *E.g.,* Ala. Code § 15–22–26 (1982); Fla. Stat. Ann. § 947.18 (West 1985); Ga. Code Ann. § 77–513 (1974); Idaho Code § 20–223(c) (1986 Supp); Kan. Stat. Ann. § 22–3717(h) (1985 Supp.); Miss. Code Ann. § 47–7–17 (1985 Supp.); N.Y. Exec. Law § 259–i2(c) (McKinney 1986 Supp.); Tenn. Code Ann. § 40–28–117(a) (1982). Unlike the Nebraska statute, therefore, section 46–23–201 is hardly "unique."

The court of appeals' opinion clearly misperceives this critical aspect of *Greenholtz*. Section 46–23–201, with its admittedly broad and subjective parole criteria, simply does not give rise to a reasonable expectation of release prior to the petitioner Board's actual determination. The respondents, unlike their Nebraska counterparts, accordingly have no statutorily–grounded presumptive right to parole but, instead, possess merely the right to release after the Board concludes the requirements of section 46–23–201 are met.[5] This difference is more than semantical since, absent the presumptive right to parole release, the respondents may legitimately claim an expectation of release only after favorable disposition of their parole applications by the

[5]The court of appeals' tortured construction of section 46–23–201 as requiring a prisoner's release when the Board "determine[s] release would not be harmful, unless specified conditions exist which would preclude parole" misstates the statute's operation. The parole requirements of section 46–23–201(1) and (2) must be read together and authorize release only when the Board believes (1) "there is reasonable probability that the prisoner can be released without detriment to [himself] or to the community"; (2) "the best interests of society" will be furthered; and (3) the prisoner "is able and willing to fulfill the obligations of a law–abiding citizen." Each of these conditions must be determined to exist before parole release may occur. Consequently, no presumptive right to parole arises, as the court of appeals seemingly suggests, if the Board concludes a prisoner can be released without detriment to himself or the community.

Board.[6] The court of appeals' failure to recognize the controlling distinction between the Montana and Nebraska statutes warrants review and correction to avoid further misapplication of *Greenholtz*.

B. Conflict with Other Circuits.

The court of appeals' cursory, and selective, review of other circuits' application of *Greenholtz* fails to address either the critical difference between the Montana and Nebraska statutes or the decisions whose reasoning cannot be reconciled with that of the opinion below. One of the earliest of those decisions, *Boothe v. Hammock, supra,* recognized that the "'shall/unless' formula [of the Nebraska statute] was decisive" in *Greenholtz* and that the involved New York statute, which closely resembles section 46–23–201(2), did "not establish a scheme whereby parole shall be ordered unless specified conditions are found to exist" and, therefore, did not create a

[6]That the Board is required to parole prisoners who satisfy release standards under section 46–23–201 does not further the respondents' cause because, as the district court held, those standards are so broad, and the Board's decision–making discretion accordingly so great, that no objectively–based expectation of parole release can reasonably be asserted. Elementally put, the fact parole is mandated when certain criteria are met does not, in view of the highly subjective and predictive nature of the underlying evaluation, mean the respondents have any expectation more concrete than the possibility of parole. Thus, even if theoretically the Board's discretion is somewhat more circumscribed through use of "shall" and not "may" in section 46–23–201(1), the difference is practically so insubstantial as to be *de minimis* for due process clause purposes.

constitutionally–protected interest in parole release.[7] The Second Circuit reiterated this analysis more recently in *Berard v. Vermont Parole Board,* 730 F.2d 71, 75 (1984), where, interpreting Vt. Stat. Ann. tit. 28, § 501(c) (1985 Supp.), it said, "unlike *Greenholtz*, there is no presumption under the Vermont parole statute or Board rules that [the plaintiff–inmate] will be released unless certain defined negative findings are made."[8]

---

[7]The statute construed in *Boothe* is N.Y. Exec. Law § 259–i2(c) (McKinney 1986 Supp.):

> Discretionary release on parole shall not be granted merely as reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. ...

[8]The Vermont statute provides in relevant part: "An inmate shall be released on parole only when the board determines that the inmate is willing to fulfill the obligations of a law–abiding citizen."

The Fifth and Eleventh Circuits have reached the same result with analogous reasoning in decisions applying Alabama,[9] Florida,[10] and

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[9]*Thomas v. Sellers,* 691 F.2d 487, 489 (11th Cir. 1982) *(per curiam). Thomas* construed Ala. Code § 15–22–26 (1982) which provides in relevant part:

> No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of pardons and paroles is of the opinion that there is reasonable probability, that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society. ...

[10]*Diamiano v. Florida Parole & Prob. Comm'n,* 785 F.2d 929, 931–32 (11th Cir. 1986) *(per curiam); Hunter v. Florida Parole & Prob. Comm'n,* 674 F.2d 847 (11th Cir. 1982) *(per curiam); Staton v. Wainwright,* 665 F.2d 686, 688 (5th Cir.), *cert. denied,* 456 U.S. 909 (1982). These cases construed Fla Stat. Ann. § 947.18 (West 1985) which provides in relevant part:

> [N]o person shall be placed on parole until and unless the commission shall find that there is reasonable probability that, if he is placed on parole, he will live and conduct himself as a respectable and law–abiding person and that his release wi'l be compatible with his own welfare and the welfare of society. No person shall be placed on parole unless and until the commission is satisfied that he will be suitably employed in self–sustaining employment or that he will not become a public charge. ...

Georgia[11] parole–release statutes. The seminal authority for these decisions is *Williams v. Briscoe, supra,* in which the Fifth Circuit stated, with particular reference to Tex. Code Crim. P. art. 42.12, § 15(f) (Vernon 1979), that the parole board's evaluation, "which contains both subjective and objective factors, makes totally unwarranted any suggestion that the statute creates a presumption of entitlement to release on parole after the accrual of the minimum time of incarceration." 641 F.2d at 277.[12] Other circuits have also accurately noted that the uniqueness of the Nebraska statute, as well as the basis for finding a protected liberty interest in *Greenholtz*, lay in its "shall/unless" formulation. *Mayes v.*

[11] *Slocum v. Georgia State Bd. of Pardons*, 678 F.2d 940, 941 (11th Cir. 1981), *cert. denied*, 459 U.S. 1043 (1982); *see also Jackson v. Reese*, 608 F.2d 159, 160 (5th Cir. 1979). *Slocum* construed Ga. Code Ann. § 77–514 (West 1973) which provides in relevant part:

> [N]o prisoner shall be released on parole until and unless the Board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law–abiding person, and that his release will be compatible with his own welfare and the welfare of society. ...

[12] The construed Texas statute provides in relevant part:

> A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and ... when the Board believes that he is able and willing to fulfill the obligations of a law–abiding citizen. ...

Trammel, 751 F.2d 175, 177 (6th Cir. 1984) ("One of the 'unique' aspects of the Nebraska statute may be found in its direction that the parole board 'shall' order release 'unless' certain deferral criteria are present. ... That the 'shall/unless' formulation is important is supported by numerous cases"); *United States ex rel. Scott v. Illinois Parole & Pardon Board,* 669 F.2d 1185, 1190 (7th Cir.) *(per curiam), cert. denied,* 459 U.S. 1048 (1982) ("[l]ike Nebraska's [statute] [Ill. Rev. Stat. ch. 38, § 1003–3–5(c) (1979)] creates a presumption that an eligible inmate will be paroled unless one of the specified grounds for denial is found to exist and, in doing so, provides him with a legitimate expectation of parole entitled to some measure of constitutional protection"). Indeed, a prior panel of the Ninth Circuit explicitly recognized, in the context of an allegedly improper denial of a work release, that "the unique 'shall/unless' formula of the Nebraska statute was decisive in *Greenholtz*" and that "[n]o protected entitlement to release exists unless a state scheme includes that formula." *Bauman v. Arizona Department of Corrections,* 754 F.2d 841, 844 (1985).

The sole appellate decisional support for the court of appeals' opinion is *Williams v. Missouri Board of Probation & Parole,* 661 F.2d 697 (8th Cir. 1981), *cert. denied,* 455 U.S. 993 (1982). *Williams* construed Mo. Rev. Stat. § 549.261.1 (1978) which stated:

> When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release on parole any person confined in any correctional institution administered by state authorities. ...

Id. at 698.[13] Without analysis either of *Greenholtz*'s reasoning or its application by other circuits, *Williams* found the Missouri statute, by "providing that *when* the statutory and regulatory guidelines are met the inmate *shall* be released on parole[,] gives rise to the same protectible entitlement as the Nebraska scheme providing that the prisoner *shall* be paroled *unless* certain findings are made." *Id.* at 699 (emphasis in original). Except for this conclusory language *Williams* offers no support for the opinion below, and, aside from the idiosyncratic analysis in *Winsett v. McGinnes*, 617 F.2d 996, 1007 (3d Cir. 1980), *cert. denied sub nom. Anderson v. Winsett*, 449 U.S. 1093 (1981)—which the court of appeals expressly refused to follow—no circuit has applied *Greenholtz* so broadly as here.

The court of appeals' decision thus presents an opportunity not only to resolve a clear conflict among the circuits but also to confirm the otherwise evident scope of *Greenholtz*. *See Anderson v. Winsett*, 449 U.S. at

[13] The Missouri statute was subsequently repealed and replaced by a provision using the permissive "may." *See* Mo. Rev. Stat. § 217.690.1 (1984 Supp.); *Gale v. Moore*, 763 F.2d 341, 343 (8th Cir. 1985) *(per curiam)*.

1095–96; *Brandon v. District of Columbia Board of Parole*, 734 F.2d 56, 61 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 811 (1985) (noting, but finding it unnecessary to enter into, the "fray concerning parole that has followed in the wake of" *Greenholtz*). Unquestionably section 46–23–201 does not establish a presumptive right to parole upon meeting minimum time of imprisonment standards but, like the statutes of virtually every other American jurisdiction, authorizes release only *after* the petitioner Board concludes, under extremely broad and nonobjective criteria, that parole is appropriate. The Nebraska statute in *Greenholtz*, however, did create just such a presumptive entitlement through its "shall/unless" formulation. The court of appeals' failure to recognize this distinction requires review and reversal.

CONCLUSION

The petitioners respectfully request that the petition for a writ of certiorari be granted and that the court of appeals' judgment below be summarily reversed. Alternatively, they request that the petition be granted and that full briefing and argument be scheduled.

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September 1986

APPENDIX

APPENDIX

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Filed: June 26, 1986

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ALLEN and DALE JACOBSEN, on their own behalf and on behalf of all other persons similarly situated,	)	No. 85–3600
	)	D.C. # CV–84–78–BU
Plaintiffs–Appellants,	)	
v.	)	OPINION
BOARD OF PARDONS; HENRY E. BURGESS, Chairman,	)	
Defendants–Appellees.	)	

Appeal from the United States District Court
for the District of Montana
W. D. Murray, Senior District Judge, Presiding
Argued and submitted October 10, 1985
San Francisco, California

Before: SNEED, SCHROEDER, and BRUNETTI, Circuit Judges.

SCHROEDER, Circuit Judge.

The appellants seek to maintain a class action under 42 U.S.C. § 1983 on behalf of "all present and future

inmates of the Montana State Prison who are now or may become eligible for parole." They seek to show that the Montana Board of Pardons is failing to use proper standards for determining parole eligibility and thereby denying prisoners due process of law as guaranteed by the fourteenth amendment of the Constitution.

Appellants' suit is one of many which followed in the wake of the Supreme Court's decision in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). The Supreme Court there held that a state prison inmate does not have a federally guaranteed right to parole. *Id.* It also held that a state, through its own enactments, can create an "expectancy of release," which is a liberty interest entitling inmates to some due process protections before parole is denied. 442 U.S. at 12; *see also Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that state statute granting good–time credits to inmates created a liberty interest protected by due process guarantees).

The district court dismissed appellants' action. It concluded that the Montana statute did not create a liberty interest because it made the granting of parole too dependent upon the exercise of Parole Board discretion. The district court in this case followed *Campbell v. Montana State Board of Pardons*, 470 F. Supp. 1301 (D. Mont. 1979), a one–paragraph opinion stating that the Montana statute did not create a liberty interest in parole.

The only issue before us is whether the Montana statute creates a protected liberty interest. This is a question of law which we must determine under the standards of *Greenholtz*, as illuminated by the decisions of other federal courts in cases spawned by *Greenholtz*. It is a question which must be decided by examining the particular provisions of the state enactment in question, pursuant to *Greenholtz*'s admonition to proceed on a case–by–case basis. *Greenholtz*, 442 U.S. at 12. We hold that the Montana statute does create such a liberty interest and therefore we reverse the district court.

In *Greenholtz*, the Nebraska statute which the Court held conferred a due process entitlement provided:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment ... in the facility will

> substantially enhance his capacity to lead a law–abiding life when released at a later date.

Neb. Rev. Stat. § 83–1,114(1) (1976).

The Supreme Court in *Greenholtz* focused upon the structure of that statute. By using the word "shall," it mandates parole unless the Board determines that one or more enumerated reasons exist which would make parole unwise in the given case. The Court recognized that the statute vests very broad discretion in the Board and "is necessarily subjective in part and predictive in part." 442 U.S. at 13.

The Montana statute is similar in structure to the Nebraska statute in *Greenholtz*. The Montana statute provides:

> (1) Subject to the following restrictions, the board shall release on parole . . . any person confined in the Montana state prison . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community:
>
> (a) No convict . . . may be paroled until he has served at least one–half of his full term, . . . except that a convict designated as a nondangerous offender . . . may be paroled after he has served one–quarter of his full term . . . . Any offender serving a time sentence may be paroled after he has served . . . $17\frac{1}{2}$ years.

> (b) No convict serving a life sentence may be paroled until he has served 30 years . . . .
>
> (2) A parole shall be ordered only for the best interest of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law–abiding citizen.

Mont. Code Ann. § 46–23–201.

The Montana statute, like the Nebraska statute in *Greenholtz*, uses mandatory language. It states that the Board "shall" release a prisoner on parole when it determines release would not be harmful, unless specified conditions exist which would preclude parole. There is no doubt that it, like the Nebraska provision in *Greenholtz*, vests great discretion in the Board. Under both statutes the Board must make difficult and highly subjective decisions about risks of releasing inmates. However, the Board may not deny parole under either statute once it determines that harm is not probable.

The only post–*Greenholtz* case in which this court has considered a parole statute is *Bowles v. Tennant*, 613 F.2d 776 (9th Cir. 1980). There we examined the federal parole statute, 18 U.S.C. § 4206(a). We noted there that the federal statute, like the Nebraska statute in *Greenholtz*, has mandatory language which we termed "[a]n important factor" in deciding whether a statute creates an expectation of

parole sufficient to create a protected liberty interest. *Bowles*, 613 F. 2d at 778. We also observed that the federal statute contains a qualifying provision allowing the Commission to deny parole for "good cause," regardless of the guidelines set forth elsewhere in the statute. Because of that proviso, we concluded that the federal statute provides an expectation of parole "no greater than that provided by the Nebraska statute." *Id.* We did not decide whether or not it created a liberty interest, because we concluded that the Parole Commission in that case had provided all of the due process required in *Greenholtz*.

The Montana statute contains the key mandatory language discussed in *Greenholtz*. It does not contain a proviso like that in the federal statute removing limitations on the reasons for denying parole. Following our analysis in *Bowles*, we conclude that the Montana statute creates an expectation of parole greater than that created by the federal statute.

In *Baumann v. Arizona Department of Corrections*, 754 F.2d 841, 843–45 (9th Cir. 1985), we considered the Arizona work furlough program. The program was administered under regulations which did not contain any criteria limiting the discretion of officials and thus did not mandate the Department of Corrections to provide work furlough when criteria were met. We held that a mandatory formulation was crucial to creation of a constitutionally protected liberty interest, and held that none had been created

in that case. Because the Montana statute has a mandatory requirement for parole release when its criteria are satisfied, *Baumann* does not support the position of the Montana Board in this case.

An examination of decisions in other circuits shows a fairly clear decisional pattern in post– *Greenholtz* decisions considering various state parole statutes. Those state enactments which courts have held do not create a liberty interest do not have mandatory language that parole "shall" be granted when given criteria are met. *See, e.g., Peck v. Battey*, 721 F.2d 1157 (8th Cir. 1983) (South Dakota statute establishes no criteria for assessing parole eligibility); *Williams v. Briscoe* , 641 F.2d 274 (5th Cir.), *cert. denied*, 454 U.S. 854 (1981) (Texas statute provided that parole panel *may* recommend parole); *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979) (Ohio Board *may* grant parole if it believes it would further the interests of justice and be consistent with society's welfare); *Shirley v. Chestnut*, 603 F.2d 805 (10th Cir. 1979) (Oklahoma statute establishes no criteria for assessing parole eligibility).

On the other hand, those state enactments which circuits have held do create a liberty interest generally have contained either a mandatory provision that parole shall be granted when criteria are met, or have expressly created a presumption of eligibility unless certain negative criteria are found. *See Mayes v. Trammell*, 751 F.2d 175 (6th Cir. 1984) (Tennessee parole rules create presumption of

eligibility, subject to finding of listed adverse factors); *Williams v. Missouri Board of Probation and Parole*, 661 F.2d 697 (8th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). In *Williams* the Eighth Circuit held that the Missouri parole statute then in effect created a protected liberty interest by providing that "[w]hen in [the Board's] opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the Board shall release on parole any person confined . . . ." Mo. Rev. Stat. § 549.261.[1]

The key language of that Missouri statute is virtually identical to the Montana parole statute before us. Given the similarities between the Montana statute and the Missouri statute considered in *Williams*, any decision other than the one we reach would squarely conflict with the Eighth Circuit's decision in *Williams*.

---

[1]Missouri amended its parole statute after the Eighth Circuit's decision in *Williams v. Missouri Board of Probation and Parole* , 661 F.2d 697 (8th Cir. 1981). The current statute, Mo. Rev. Stat. § 217.690 (Supp. 1982), provides:

> When in its opinion there is a reasonable probability that an inmate . . . can be released without detriment to the community or to himself, the board *may in its discretion* release or parole such person. (emphasis added).

The Eighth Circuit has held that the new statute is materially different from the previous one, and does not create a protected liberty interest in parole. *Gale v. Moore*, 763 F.2d 341, 343 (8th Cir. 1985).

The Seventh Circuit has found a liberty interest in an Illinois statute that appears to grant even more discretion to its parole board than does either the Montana or the Missouri statute. *Scott v. Illinois Parole and Pardon Board*, 669 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1048 (1982). The Illinois statute provided that the Board "shall not" parole a person if it determines that he would not conform to conditions of parole or his release would deprecate the seriousness of his offense or would have an adverse affect [*sic*] on institutional discipline. Ill. Rev. Stat. Ch. 38, § 1003–3–5(c).

There is at least one decision which has gone even farther. In *Winsett v. McGinnes*, 617 F.2d 996 (3d Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1093 (1981), the Third Circuit analyzed a work release program which contained no mandatory language or presumptions of release. It held that a liberty interest under the program arises when a prisoner satisfies eligibility requirements and when the exercise of prison officials' discretion "is consistent with work release policy." *Id.* at 1007. Justice White's opinion dissenting from denial of certiorari notes a conflict between it and other circuits' decisions. 449 U.S. at 1095.

Our opinion in *Baumann* rejected the Third Circuit's approach in *Winsett*, 754 F.2d at 844–45, and we do not follow it here. We follow instead the guidelines which have developed from *Greenholtz* and the decisions of our own

and other circuits in holding that the statute in question here does create a liberty interest in parole. Any discussion of the nature of the process which is due the appellants or whether Montana's present procedures accord that due process is premature. We hold only that the appellants state a claim upon which relief can be granted.[2]

Reversed and remanded for further proceedings.

[2]Both named plaintiffs were released on parole after this suit was filed. However, because the complaint seeks compensatory damages in addition to declaratory and injunctive relief, the appeal is not moot. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 57.13, at 57–116 (2d ed. 1985) (claim for money damages not moot even if claims for declaratory and injunctive relief based on same injury are moot).

Filed: January 9, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

GEORGE ALLEN and DALE JACOBSEN, on their own behalf and on behalf of all other persons similarly situated,	:	
Plaintiffs,	:	MEMORANDUM AND
vs.	:	ORDER
BOARD OF PARDONS, HENRY E. BURGESS, Chairman,	:	No. CV–84–78–BU
Defendants.	:	

Plaintiffs George Allen and Dale Jacobsen filed this action pursuant to 42 U.S.C. §1983 charging the state parole board and its chairman with violating their civil rights.

Specifically, the complaint alleges defendants deprived plaintiffs of due process when the board denied parole to each of them. The plaintiffs contend the board does not apply the proper criteria in determining parole eligibility and fails to adequately explain its reasons for denying parole.

Plaintiffs seek declaratory and injunctive relief as well as damages. They also request class action certification. The defendants move the court to dismiss the action for failing to state any deprivation of federally–secured rights.

This matter initially was referred to the United States Magistrate for proposed findings. Relying on this court's decision in *Campbell v. Montana State Board of Pardons*, 470 F.Supp. 1301 (D. Mont. 1979), the Magistrate recommends the case be dismissed. The court now considers that recommendation and plaintiffs' objections to it.

The court concludes that plaintiffs have failed to state a claim upon which relief may be granted. It is well settled that prisoners have no constitutional or inherent right to parole. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). State statutes, however, may create liberty interests that are entitled to the

procedural protections of the Due Process Clause of the Fourteenth Amendment.

In *Greenholtz*, the Supreme Court rejected the argument that a reasonable entitlement to due process is created whenever a state provides for the mere possibility of parole. Rather, the Court determined that the mandatory nature of the particular language of the Nebraska parole statute creates an expectancy of parole and triggers the need to observe due process requirements. The Nebraska scheme giving rise to this limited liberty interest provides that the parole board "shall" release an inmate unless one of the four designated reasons are found. In addition, the Nebraska scheme requires the parole board to consider fourteen statutory factors. The Supreme Court added the following cautionary note to its *Greenholtz* opinion:

> However, we emphasize that this statute has unique structure and language, and thus whether any other state statute provides a protectible entitlement must be decided on a case–by–case basis.

442 U.S. at 12.

Thus, in the instant case, Montana's statutory parole scheme must be examined to determine whether it provides

sufficient certainty of release to entitle a prisoner to some measure of due process protection in connection with the parole board's decision. The Montana parole statute, Mont. Code. Ann. §46–23–201, provides in relevant part:

> (1)...[T]he board shall release on parole any person confined in the Montana State [*sic*] prison when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or the community.
>
> (2) A parole shall be ordered only for the best interests of society ... A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law–abiding citizen.

This statute was construed in the similar case of *Campbell v. Montana State Board of Pardons* , 470 F.Supp. 1301 (D. Mont. 1979). In *Campbell*, Judge Smith concluded that parole under the Montana statutory scheme depends entirely on the discretion of the board. 470 F.Supp. at 1302. Thus, the statute creates no entitlement to due process protections.

Plaintiffs concede *Campbell* resolves the threshold issue presented herein. Plaintiffs argue, however, that the

repeated appearance of the word "shall" in the above–cited statute creates an expectation of parole. They ask the court to overrule the holding in *Campbell*.

The court is not persuaded by plaintiffs' argument. An examination of the Montana parole provision reveals that vast discretion is vested in the board. The appearance of the word "shall" is misleading at best. The board's discretion is limited only by general references to considerations such as "the best interests of society" and the "board's belief that a prisoner is able and willing to be a law–abiding citizen." The Montana statute lists no factors required to be considered by the parole board. Parole under the Montana system appears largely a judgment call. The court determines that the Montana statutory scheme creates only the possibility of parole, not the entitlement to it. The board itself decides what factors to apply on a case–by–case basis. In the court's opinion, the parole statute does not provide certain enough guidance to the board to create anything but the mere possibility of release dependent on the board's discretion. Under the *Greenholtz* rule, plaintiffs were not entitled to due process protections in connection with the board's denial of parole.

The court, therefore, will grant defendants' motion to dismiss the action. This conclusion renders resolution of defendants' remaining motions unnecessary.

IT IS ORDERED and this does order that defendants' motion to dismiss for failure to state a claim upon which relief can be granted is GRANTED.

Done and dated this 8th day of January, 1985.

W. D. Murray
Senior United States District Judge

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Filed: May 29, 1984

UNITED STATES DISTRICT COURT

DISTRICT OF MONTANA

GEORGE ALLEN and DALE JACOBSEN, on their own behalf and on behalf of all other persons similarly situated,	)	Civ. No. CV–84–78–BU
Plaintiffs,	)	
vs.	)	COMPLAINT
BOARD OF PARDONS; HENRY E. BURGESS, Chairman,	)	
Defendants.	)	

PRELIMINARY STATEMENT

This lawsuit seeks to compel the Board of Pardons to use proper criteria in determining a prisoner's eligibility for

parole, and also, when it denies parole, to explain its reasons for doing so. Plaintiffs contend that the Board neither used proper criteria to determine their eligibility for parole nor adequately explained the reasons for denying it, in violation of rights secured to plaintiffs by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

JURISDICTION

1. The court has jurisdiction of plaintiffs' claims for relief pursuant to 28 U.S.C. §1343(3) because plaintiffs' claims are brought pursuant to 42 U.S.C. §1983.

PLAINTIFFS

2. Plaintiffs George Allen and Dale Jacobsen are adult citizens residing at all times material to this action at the Montana State Prison in Deer Lodge, Montana.

CLASS ACTION

3. This action is brought on behalf of the named plaintiffs and also on behalf of all other persons similarly situated, pursuant to Rule 23(b)(1) and (b)(2) FRCP. The persons similarly situated include all present and future inmates of the Montana State Prison who are now or who may become eligible for parole. Relief for the class is sought not for damages but only for declaratory and injunctive relief.

DEFENDANTS

4. The defendant Board of Pardons is that agency vested by state law with the obligation of

administering the State's program for the parole of prisoners, and is responsible for the acts and omissions challenged in this lawsuit. Defendant Henry E. Burgess is the chairman of said Board and is sued herein in his individual and official capacity.

FACTUAL ALLEGATIONS

5. Montana law requires that a prisoner be placed on parole when, in the opinion of the Board of Pardons, "he is able and willing to fulfill the obligations of a law-abiding citizen" and when "there is a reasonable probability that the prisoner can be released without detriment to himself or to the community." Sec. 46-23-201 R.C.M.

6. However, the Board of Pardons does not apply these standards in determining eligibility for parole. Both of the plaintiffs, for example, have been denied parole without any finding by the Board that they are unable or unwilling to fulfill the obligations of a law-abiding citizen or constitute a detriment to themselves or to the community.

7. The Board of Pardons acts as if certain offenses carry no possibility of parole despite the fact that the Legislature has decreed otherwise. Plaintiffs, for example, have been denied parole because of the "nature of the offense" they committed, rather than because of any individual determination that they are unable to assume the obligations of a law-abiding citizen. [See Appendices A, B and C].

8. Section 46-23-201 requires that an individual determination be made of each prisoner's ability to fulfill the obligations of a law-abiding citizen. The Board of Pardons ignores this responsibility.

9 The Board of Pardons fails to use correct standards in determining a prisoner's eligibility for parole, and also, when it denies parole, it fails to adequately explain its reasons for doing so.

10. The reasons given by the Board for denying parole to plaintiffs Allen and Jacobsen are so vague and ill-defined that plaintiffs do not know what they must do to qualify for parole.

11. The acts and omissions of the defendants have caused plaintiffs to suffer needless pain and suffering, loss of the opportunity to be fairly considered for parole, mental distress and irreparable harm for which there is no adequate remedy at law.

FIRST CLAIM FOR RELIEF

12. Based on the allegations set forth above, plaintiffs allege as their first claim for relief that defendants have failed to use proper standards for determining their eligibility for parole, in violation of rights secured to them by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF

13. Based on the allegations set forth above, plaintiffs allege as their second claim for relief that

defendants have failed to adequately explain the reasons for denying them parole, in violation of rights secured to them by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF

14. Based on the allegations set forth above, plaintiffs allege as their third claim for relief that defendants are causing them to suffer more punishment than intended by the Legislature, in that their applications for parole have not been fairly considered, in violation of rights secured to them by the Eighth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this honorable court will:

1. Assume jurisdiction of this cause and advance it on the court's calendar.

2. Determine that this action may be maintained as a class action pursuant to Rule 23(b)(1) and (b)(2).

3. Issue declaratory relief pursuant to 28 U.S.C. §§2201 and 2202, declaring that defendants have violated plaintiffs' rights under the Eighth and Fourteenth Amendments.

4. Issue injunctive relief pursuant to Rule 65 FRCP, enjoining defendants and all persons acting in concert with them from denying plaintiffs the rights secured

to them by the Eighth and Fourteenth Amendments to the United States Constitution.

5. Award plaintiffs compensatory damages in an amount as the proof may show.

6. Award plaintiffs their costs and attorney's fees and such additional relief as may seem just under the circumstances.

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OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF PARDONS, et al.,

Petitioners,

—v.—

GEORGE ALLEN, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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October 1986

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QUESTION PRESENTED

Whether Mont. Code Ann. 46-23-201 (1985) creates a liberty interest in parole release subject to protection under the due process clause of the Fourteenth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete. Several critical points are omitted, and these points will now be made.

This lawsuit was initiated by two Montana prisoners whose applications for parole were denied by the Parole Board even though they clearly met the legislative requirements for a parole. In denying their applications, the Board failed to cite to any of the statutory criteria. Instead, it issued cursory statements advising plaintiffs that they must "discharge their sentence," meaning that no future application would even be considered.

This case was filed as a class action on behalf of all present and future inmates of the Montana State Prison who, like the two named plaintiffs, have had or will have their applications for parole considered under an improper standard. Specifically,

the Complaint alleges that Montana's paroling agency, the Board of Pardons and Parole, fails to apply state-mandated criteria in deciding eligibility for parole and, instead, the Board employs its own arbitrary standard.

Within weeks after the Complaint was filed, the Board sua sponte reconsidered the applications of the two named plaintiffs. The Board agreed that these men were indeed eligible for parole and that it had made a mistake. Parole was granted.[1]

Nevertheless, the Board argued in the district court that its decisions, however erroneous or arbitrary they might sometimes be, are absolute and beyond review. Montana's parole statute, the Board contended, gives inmates no protected interest in

---

[1]This case is not moot even though the named plaintiffs are on parole, as petitioners recognize. See Allen v. Board of Pardons, 792 F.2d 1404, 1408 n.2 (9th Cir. 1986).

parole. The district court accepted that argument but, for obvious reasons, the Ninth Circuit reversed.

REASONS FOR DENYING THE WRIT

A. The Case Does Not Merit Review.

This case raises only one, narrow issue: Does Montana's parole statute create a protected liberty interest in parole? This Court has already resolved the only broad issue in this field of the law. In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), the Court held that a prison inmate does not have a constitutional right to parole per se but that a state statute can nevertheless create an "expectancy of parole" such that an inmate is entitled to minimum due process protec-

tions when parole is denied. Id., at 12.

Greenholtz carefully pointed out that each parole statute must be considered separately to determine whether it creates a protected liberty interest. The Court established a number of guidelines to aid in this independent analysis.

The Ninth Circuit used the Greenholtz guidelines in deciding this case. There is nothing in its decision which warrants review. The decision is tailored to the facts of this case and, by its own terms, it only applies to Montana's present statute, a statute that can be amended by the legislature at any time.[2] There is no need for this Court to review a decision

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[2]A federal court ruled in 1981 that Missouri's parole statute created a protected interest in parole. The following year, the state amended this statute and removed that interest. See Allen, id, at 1407 n.1. Montana can do the same unless, of course, it continues to feel that its Parole Board should not have absolute, unbounded power.

that has such limited application.

B. The Decision Below Does Not Conflict With Any Federal Court Decision.

There are at least twenty reported cases that are the progeny of Greenholtz, each construing a parole statute. Yet defendants do not cite a single conflict regarding the issue presented here. Every court to consider the question has held that the use of mandatory language of the type contained in Montana's parole statute creates a protected interest in parole. There simply is no conflict in the circuits on this issue.[2]

---

[2]There is only one post-Greenholtz issue that has engendered any conflict, but that issue is not relevant here. In Winsett v. McGinnis, 617 F.2d 996 (3d Cir. 1980)(en banc), cert. denied, 449 U.S. 1093 (1981), the court held that, even though a parole statute failed to contain mandatory language ordering the release of certain prisoners, the parole agency's implementing regulations did create a protected interest in parole. Justice White, dissenting from (ftn. 2 cont. next page)

C. The Decision Below is Eminently Correct.

Parole statutes can be divided into two categories: the mandatory "shall" statutes, and all the rest. The court below carefully noted this distinction. Allen v. Board of Pardons, 792 F.2d 1404, 1407-08 (9th Cir. 1985). Without exception, every court that has reviewed a mandatory "shall" statute has held that it creates a protected liberty interest in parole.

---

the denial of certiorari, recommended that the Court consider this question. 449 U.S. at 1093-95. This issue, though, is not raised here. Indeed, the court below expressly rejected Winsett's approach. Allen, supra, 792 F.2d at 1408. Instead, it confined its analysis to the statute itself and then held, as every court to consider a similar statute has held, that it created a protected interest in parole because of its mandatory language.

The Nebraska statute[3] reviewed in

[3]The Nebraska statute reviewed in Greenholtz, Neb. Rev. Stat. 83-1,114(1), provided in whole as follows:

> Whenever the Board of Parole considers the release of a committed offender, who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) there is substantial risk that he will not conform to the conditions of parole;
>
> (b) his release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) his release would have a substantially adverse effect on institutional discipline; or
>
> (d) his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to (ftn. 3 cont. next page)

Greenholtz is a mandatory 'shall statute. It's language states that the parole board "shall order [an inmate's] release unless" any one of four exceptions exists. The use of the word "shall" in this mandatory fashion imposes an obligation on the board and creates a protected interest in parole release. The Court agreed with the prisoners "that the structure of the provision together with its use of the word 'shall' binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found." Id. at 11-12.

The Montana statute[4] is also a

> lead a law-abiding life when released at a later date.

[4]The Montana statute at issue here, Mont. Code Ann. 45-23-201 (1985), states in pertinent part (emphasis added):

> Prisoners eligible for parole. (1) Subject to the following

mandatory shall statute. Indeed, it uses the word "shall" three times in mandatory form, the most critical and dispositive being the "shall...when" clause found in subparagraph (1). The Nebraska law uses

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> restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison or the women's correctional center, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community....
>
> (2) A parole shall be ordered only for the best interests of society and not has an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that his is able and willing to fulfill the obligations of a law-abiding citizen.

the word "shall" once: "...the Board of Parole...shall order his release unless...." The Montana statute contains an almost identical directive: "...the board shall release on parole by appropriate order any person...when...." In addition, the Montana statute repeats this command twice more: "A parole shall be ordered...." and "A prisoner shall be placed on parole...." It is abundantly clear that, although the Montana Board of Pardons may wish to weild absolute power, this is not the role that its legislature has created for it.

The Montana legislature's use of the word "shall" binds the parole board. The board's discretion may be great, but it is not absolute.[5]

---

[5]In both the Nebraska and Montana statutory schemes, the paroling agency has substanial discretion--but not absolute discretion--to determine parole eligibility. Indeed, there is no precise

The Montana statute is a mandatory "shall" statute, and every court to consider such a statute has held that it creates a protected interest in parole. As the Ninth Circuit noted, there is "a fairly clear decisional pattern in post-Greenholtz decisions considering various state parole statutes." Allen, supra, at 1407. This conclusion is correct, and it is only by misrepresenting the cases that petitioners attempt to dispute it.

According to petitioners, the Montana statute is not a mandatory "shall" statute, despite its clear language. Petitioners

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combination of factors that would guarantee release. Yet this does not mean that the agency has absolute discretion. As the Court took pains to explain in Greenholtz, parole itself is an experimental institution, and "Nebraska's statute is necessarily subjective in part and predictive in part." Id., at 13. "It is thus not surprising that there is no prescribed or defined combination of facts which, if shown, would mandate release on parole." Id., at 8.

cite several cases that reviewed parole statutes which, according to petitioners, "closely resemble" Montana's and yet concluded that the statute at issue was not a mandatory shall statute.

Simply stated, every court to consider a parole statute closely resembling Montana's has held that it creates a protected interest in parole, and petitioners' contention is erroneous. For example, petitioners claim that the New York statute reviewed in Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979) is similar to Montana's and yet was held to create no protected interest. [Brief of Pet. at 15]. However, New York's statute, N.Y. Executive Law 259-i2(c) (McKinney Supp.1978), expressly states in its first sentence: "Discretionary release on parole shall not be granted merely as a reward for good conduct...." (Emphasis supplied in Boothe, at 664 n.3).

New York's law does not use the mandatory "shall" approach and it was for this reason that the court ruled as it did.

Petitioners equally misrepresent the Texas statute reviewed in Williams v. Briscoe, 641 F.2d 274 (5th Cir.), cert. denied, 454 U.S. 854 (1981). Petitioners claim this statute, which was held to confer no protected interest in parole, is similar to Montana's. [Brief of Pet. at 18]. In their reprint of this statute, petitioners conveniently forget to cite the following portion of it: "A parole panel, as hereinafter provided, may recommend the granting, denying, or revocation of parole...." Tex.Code Crim.Proc. art. 42.12 sec. 14A(e) (emphasis added). A discretionary "may" statute is patently different than a mandatory "shall" statute, and the Fifth Circuit was correct in ruling as it did.

None of the statutes cited by petitioners "closely resembles" Montana's. Those which happen to contain the word "shall" all do so negatively, in non-mandatory language. For instance, the Alabama provision reviewed in Thomas v. Sellers, 691 F.2d 487 (11th Cir. 1982), Alabama Code 15-22-26 (1982), provides: "No prisoner shall be released on parole merely as a reward for good conduct...." This language is far different than that contained in Montana's statute, which affirmatively instructs that the board "shall release on parole" certain prisoners.[6]

---

[6]In addition to misrepresenting the cases, petitioners make another glaring error: they baldly assert that the only type of statute that can confer a protected interest in parole is the "shall/unless" formula adopted by Nebraska. Surely Greenholtz did not tell 49 states that the only way to impose constitutional limits on their parole boards is to enact Nebraska's statute. Indeed, the Court recognized in Greenholtz that "the very institution of

There are, to be sure, a number of parole statutes that do resemble Montana's, among them the federal parole statute. Without exception, these have been found to confer a protected interest in parole. See e.g., Williams v. Missouri Board of Probation and Parole, 661 F.2d 697 (8th Cir. 1981), cert. denied, 455 U.S. 993 (1982) (former Missouri statute); United States ex rel Scott v. Illinois Parole and Pardon Board, 669 F.2d 1185 (7th Cir. 1982), cert. denied, 459 U.S. 1048 (1982) (Illinois law); Evans v. Dellahunty, 662

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parole is still in an experimental stage." Id., 442 U.S. at 8. Petitioners' claim that so early in this experiment the Court has chosen to severely crimp the states' freedom of choice has no support either in Greenholtz or in the Court's history. Cf. Anderson v. Winsett, 449 U.S. 1093 (1981) (White and Rehnquist, JJ., dissenting from a denial of certiorari)("We did not expressly state in Greenholtz that the 'shall...unless' language of the Nebraska statute was the critical factor underlying our determination that the statute created a liberty interest.") Id. at 1095.

F.2d 522 (8th Cir. 1981) (federal parole statute).

The Montana Supreme Court has also rejected petitioners' argument that the parole board has absolute discretion. In Lopez v. Crist, 176 Mont. 352, 578 P.2d 312 (1978), decided even prior to Greenholtz, the court considered a prisoner's claim--similar to the one plaintiffs make here--that the parole board was unjustly refusing to release him. The supreme court agreed and ordered the board "to release [Mr. Lopez] from custody to parole status." 578 P.2d at 314. Thus, eight years ago the Montana Supreme Court repudiated the claim which petitioners make here--that their decisions are unbounded and beyond review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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REPLY

BRIEF

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(3)

No. 86-461

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOARD OF PARDONS;
HENRY BURGESS, Chairman,

Petitioners,

v.

GEORGE ALLEN and DALE JACOBSEN,
on their own behalf and on behalf of
all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Respondents.

PETITIONERS' REPLY MEMORANDUM

I. THE RESPONDENTS' OPPOSITION TO THE PETITION FAILS TO ADDRESS THE DISPOSITIVE ISSUE: WHETHER MONT. CODE ANN. § 46–23–201 CREATES A LEGITIMATE EXPECTATION OF PAROLE RELEASE UPON SATISFYING MINIMUM INCARCERATION REQUIREMENTS.

The respondents contend that "[p]arole statutes can be divided into two categories: the mandatory 'shall' statutes, and all the rest." (Opposition Br. at 6.) They

further argue that use of "shall" in Mont. Code Ann. § 46–23–201 (1985) talismatically gives rise to a protectible liberty interest in parole release. Like the court of appeals below, the respondents misconstrue *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex,* 442 U.S. 1 (1979), to reach this conclusion.

The dispositive aspect of the Nebraska parole statute in *Greenholtz* was not its utilization of "shall" but the express creation of a presumptive right to parole release when certain objective time-of-incarceration requirements were met. That presumptive right to parole made the statute unique and established a liberty interest subject to Fourteenth Amendment protection. The respondents ignore this basic predicate in *Greenholtz*'s reasoning and thus never directly confront the fundamental issue here: Does section 46–23–201 create a reasonable expectation of parole release? Quite obviously, the Montana statute does not because (1) no presumptive right to parole arises simply by serving a specified length of prison time and (2) the petitioner Board of Pardons' discretion in reviewing parole applications is, as the district court held, so bound up in subjective and predictive appraisals of future conduct as to establish only "the mere possibility of release." (App. 15a.) Use of "shall" rather than "may" accordingly has little practical or, for Fourteenth Amendment purposes, legal significance since, under either usage, the Board's discretion is far too

great to warrant a legitimate expectation of parole until release is actually ordered.[1]

The respondents also claim that the petitioners "misrepresent" various appellate decisions in arguing that the court of appeals' decision below conflicts with those from other circuits. (Opposition Br. at 11–14.) The decisions from the second, fifth, sixth, seventh and eleventh circuits cited in the petition, though, stand unequivocally for the principle that the controlling, and unique, feature of the Nebraska statute was the presumptive right to parole release arising from its "shall ... unless" language. Not only is section 46–23–201 barren of such a presumptive right, but

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[1]While the respondents admit the Board's parole–release "discretion may be great," they state "it is not absolute." (Opposition Br. at 10 n.5.) Neither *Greenholtz* nor any other decision of the Court applying the due process clause has found a liberty interest merely on the basis that official discretion is not "absolute." Indeed, were that proposition accurate, the mere possibility of parole would create a protectible liberty interest—a contention explicitly made and rejected in *Greenholtz*. Although the use of mandatory language has a place in determining whether a liberty interest exists (*Hewitt v. Helms,* 459 U.S. 460, 471-72 (1983)), such language must also be accompanied by standards sufficiently particularized to impose "substantive limitations on official discretion." *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983). Section 46-23-201, however, contains only extremely broad and general parole-release criteria which, as the Court observed in *Greenholtz,* 442 U.S. at 8, anticipate "a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." Without question these criteria are insufficient in themselves to establish a protectible liberty interest, and a requirement that a prisoner be released when they are deemed satisfied thus adds little, if anything, to a contention that the statute creates a reasonable expectation of parole.

even the respondents do not suggest that right exists. Consequently, whatever the precise syntactical differences between the several statutes involved in the other circuits' decisions and section 46–23–201, the critical fact remains that those decisions recognize the need for a presumptive right to parole before a protected liberty interest attaches—at least in the absence of detailed and nonsubjective parole-release criteria significantly restricting the decisionmaker's discretion.[2]

II. THE PETITIONERS HAVE NEVER ARGUED THAT PAROLE DECISIONS ARE BEYOND REVIEW, NOR IS SUCH AN ARGUMENT GERMANE TO THE ISSUE PRESENTED.

The respondents conclude their opposition to the petition by relying on *Lopez v. Crist,* 176 Mont. 352, 578 P.2d 312 (1978), for the proposition that the petitioner Board's decisions "are [not] unbounded and beyond review." (Opposition Br. at 16.) However, the petitioners have never so contended; they instead have argued only that no due process clause–based entitlement to parole release

[2]The respondents suggest the petitioners have argued that the Nebraska statute is "the only type of statute that can confer a protected interest in parole." (Opposition Br. at 14 n.6.) The petitioners have not made such an assertion; rather, they contended that the Nebraska statute is singular in adopting the Model Penal Code's parole–release provision and establishing a presumptive right to release. As a theoretical matter, there are undoubtedly many different approaches to statutorily creating a reasonable expectation of parole release, but section 46–23–201 is not among them.

arises under section 46–23–201. Whether an individual inmate may be entitled to state or federal habeas corpus relief from an allegedly improper parole denial is, of course, an issue distinct from that here. That a particular parole decision may be attacked through habeas corpus proceedings thus sheds no light on whether a presumptive entitlement to release is established under section 46–23–201.

Lopez v . Crist, supra, was a state habeas corpus proceeding and held that the petitioner Board could not, having determined that a prior parole revocation was improper, continue the prisoner in custody until development of a suitable parole plan. The court reasoned that the prisoner was entitled to immediate release since he was "in prison only because the authorities made an erroneous decision that he had violated the terms of his parole." 176 Mont. at 335, 578 P.2d at 314. *Lopez* establishes only that the Board's decisions are not unreviewable in state

proceedings—a conclusion which does not further the respondents' position here.[3]

III. THE DECISION BELOW RAISES A SIGNIFICANT FEDERAL QUESTION AND WARRANTS REVIEW.

Finally, the respondents suggest that the court of appeals' decision does not justify review because *Greenholtz* requires only a case–by–case review of individual parole–release statutes—which review was undertaken by the court of appeals—and because the decision applies only to the current version of section 46–23–201 which is subject to legislative amendment. Their analysis omits two key considerations: (1) The decision below represents a glaring misreading of *Greenholtz*; and (2) it involves an important matter of constitutional entitlement. If uncorrected, the decision not only will add to the confusion noted by *Brandon v. District of Columbia Board of Parole*, 734 F.2d 56, 61 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985), following in the wake of *Greenholtz* but also may impose strictures on the petitioner Board's operations inconsistent with the proper application of the Fourteenth Amendment. It is indisputable that the federal judiciary's involvement in the sensitive and difficult area of state parole–release decisionmaking should occur only when statutorily or constitutionally dictated and that basic notions of federalism militate toward precise articulation of the circumstances in which such involvement is authorized. This matter presents an opportunity to reaffirm *Greenholtz* in a manner which underscores the analytical importance of the presumptive right to parole release created under the Nebraska statute or, in the absence of such a presumption, the need for specific and well–defined limitations on the scope of official discretion, both of which elements are missing here. *See, e.g., Huggins v. Isenbarger*, 798 F.2d 203, 206 (7th Cir. 1986) (*per curiam*); *Dace v. Mickelson*, 797 F.2d 574, 579 (8th Cir. 1986) (Fagg, J., dissenting).

[3]The respondents criticize the petition's Statement of the Case as incomplete because it omitted reference to their parole release subsequent to filing of the complaint. That release, however, is irrelevant to the question presented and, as noted by the court of appeals, does not moot this matter. (App. 10a n.2.) The respondents' conclusory assertion that they were released because the petitioner Board "agreed ... that it had made a mistake" is neither of record nor correct. (Opposition Br. at 2.) This matter comes before the Court, as it did before the court of appeals, on the narrow and straightforward question of whether section 46–23–201 creates a protectible liberty interest.

CONCLUSION

The petitioners respectfully request that the petition for a writ of certiorari be granted and that the court of appeals' judgment below be summarily reversed. Alternatively, they request that the petition be granted and that full briefing and argument be scheduled.

Respectfully submitted.

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JOINT

APPENDIX

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No. 86-461

IN THE

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OCTOBER TERM, 1986

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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DISTRICT COURT PROCEEDINGS

DOCKET NUMBER	DATE	DESCRIPTION OF DOCKET ENTRY
2	May 29, 1984	Complaint
6	July 2, 1984	Motion to Dismiss, Motion to Strike, and Objections to Class Action Certification
8	July 16, 1984	Plaintiffs' Reply to Motion to Dismiss, Motion to Strike, and Objections to Class Certification
9	July 30, 1984	Defendants' Reply Brief
10	November 30, 1984	Magistrate's Findings and Recommendation
11	December 10, 1984	Plaintiffs' Objections to Magistrate's Findings and Recommendation
12	January 9, 1985	District Court's Memorandum and Order
13	January 9, 1985	Judgment
14	January 21, 1985	Notice of Appeal

COURT OF APPEALS PROCEEDINGS

DATE	DESCRIPTION OF DOCKET ENTRY
October 10, 1985	Argued and Submitted
June 29, 1986	Opinion

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UNITED STATES DISTRICT COURT

DISTRICT OF MONTANA

GEORGE ALLEN and DALE JACOBSEN, on their own behalf and on behalf of all other persons similarly situated, Plaintiffs, vs. BOARD OF PARDONS; HENRY E. BURGESS, Chairman, Defendants.	Civ. No. CV–84–78–BU COMPLAINT

PRELIMINARY STATEMENT

This lawsuit seeks to compel the Board of Pardons to use proper criteria in determining a prisoner's eligibility for

parole, and also, when it denies parole, to explain its reasons for doing so. Plaintiffs contend that the Board neither used proper criteria to determine their eligibility for parole nor adequately explained the reasons for denying it, in violation of rights secured to plaintiffs by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

JURISDICTION

1. The court has jurisdiction of plaintiffs' claims for relief pursuant to 28 U.S.C. §1343(3) because plaintiffs' claims are brought pursuant to 42 U.S.C. §1983.

PLAINTIFFS

2. Plaintiffs George Allen and Dale Jacobsen are adult citizens residing at all times material to this action at the Montana State Prison in Deer Lodge, Montana.

CLASS ACTION

3. This action is brought on behalf of the named plaintiffs and also on behalf of all other persons similarly situated, pursuant to Rule 23(b)(1) and (b)(2) FRCP. The persons similarly situated include all present and future inmates of the Montana State Prison who are now or who may become eligible for parole. Relief for the class is sought not for damages but only for declaratory and injunctive relief.

DEFENDANTS

4. The defendant Board of Pardons is that agency vested by state law with the obligation of

administering the State's program for the parole of prisoners, and is responsible for the acts and omissions challenged in this lawsuit. Defendant Henry E. Burgess is the chairman of said Board and is sued herein in his individual and official capacity.

FACTUAL ALLEGATIONS

5. Montana law requires that a prisoner be placed on parole when, in the opinion of the Board of Pardons, "he is able and willing to fulfill the obligations of a law–abiding citizen" and when "there is a reasonable probability that the prisoner can be released without detriment to himself or to the community." Sec. 46–23–201 R.C.M.

6. However, the Board of Pardons does not apply these standards in determining eligibility for parole. Both of the plaintiffs, for example, have been denied parole without any finding by the Board that they are unable or unwilling to fulfill the obligations of a law–abiding citizen or constitute a detriment to themselves or to the community.

7. The Board of Pardons acts as if certain offenses carry no possibility of parole despite the fact that the Legislature has decreed otherwise. Plaintiffs, for example, have been denied parole because of the "nature of the offense" they committed, rather than because of any individual determination that they are unable to assume the obligations of a law–abiding citizen. [See Appendices A, B and C].

8. Section 46–23–201 requires that an individual determination be made of each prisoner's ability to fulfill the obligations of a law–abiding citizen. The Board of Pardons ignores this responsibility.

9. The Board of Pardons fails to use correct standards in determining a prisoner's eligibility for parole, and also, when it denies parole, it fails to adequately explain its reasons for doing so.

10. The reasons given by the Board for denying parole to plaintiffs Allen and Jacobsen are so vague and ill–defined that plaintiffs do not know what they must do to qualify for parole.

11. The acts and omissions of the defendants have caused plaintiffs to suffer needless pain and suffering, loss of the opportunity to be fairly considered for parole, mental distress and irreparable harm for which there is no adequate remedy at law.

FIRST CLAIM FOR RELIEF

12. Based on the allegations set forth above, plaintiffs allege as their first claim for relief that defendants have failed to use proper standards for determining their eligibility for parole, in violation of rights secured to them by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF

13. Based on the allegations set forth above, plaintiffs allege as their second claim for relief that

defendants have failed to adequately explain the reasons for denying them parole, in violation of rights secured to them by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF

14. Based on the allegations set forth above, plaintiffs allege as their third claim for relief that defendants are causing them to suffer more punishment than intended by the Legislature, in that their applications for parole have not been fairly considered, in violation of rights secured to them by the Eighth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this honorable court will:

1. Assume jurisdiction of this cause and advance it on the court's calendar.

2. Determine that this action may be maintained as a class action pursuant to Rule 23(b)(1) and (b)(2).

3. Issue declaratory relief pursuant to 28 U.S.C. §§2201 and 2202, declaring that defendants have violated plaintiffs' rights under the Eighth and Fourteenth Amendments.

4. Issue injunctive relief pursuant to Rule 65 FRCP, enjoining defendants and all persons acting in concert with them from denying plaintiffs the rights secured

to them by the Eighth and Fourteenth Amendments to the United States Constitution.

5. Award plaintiffs compensatory damages in an amount as the proof may show.

6. Award plaintiffs their costs and attorney's fees and such additional relief as may seem just under the circumstances.

Stephen L. Pevar
Amy Silberberg

Neil J. Lynch

Attorneys for Plaintiffs

APPENDIX "A"

STATE OF MONTANA
BOARD OF PARDONS
Deer Lodge, Montana

Date: November 20, 1992

To: ALLEN, George MSP No. A016757

This is to notify you of the decision of the State Board of Pardons in the matter of your parole consideration this date.

_____ 1. That you be paroled to any plan approved by the Field Officer.

_____ 2. That you be paroled subject to the following special conditions:

_____

_✓_ 3. That your case be continued until [illegible] because:

☐ Poor institutional conduct record.

☐ Poor institutional work record.

☐ Past criminal history.

☐ Nature of offense.

☐ Inadequate parole plan.

☐ Lack of treatment in plan.

☐ Other

Board recommends Continued Veteran's Counseling Therapy. If willing Veteran Program available.

FURTHER COMMENTS:

The action noted above is taken by the Board of Pardons on your request for parole. Any misconduct may result in change of favorable action.

By [illegible]
Secretary, Board of Pardons

cc: Records Clerk
File
APO&P

BEST AVAILABLE COPY

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APPENDIX "C"

STATE OF MONTANA
BOARD OF PARDONS
Deer Lodge, Montana

338

TO: ALLEN, Charles MSP#: A016762 (Unit B)

DATE: November 30, 1983

The Board of Pardons of the State of Montana, in regular session, has taken the following action in your case:

At the annual review of your case there was no change in the former disposition due to the nature of your offense.

BOARD OF PARDONS

BY: John Lynch
Executive Secretary

cc: Records Clerk
File
AP & P

APPENDIX "C"

25

Disposition Form

STATE OF MONTANA
BOARD OF PARDONS
Deer Lodge, Montana

Date: September 29, 1982

To: JACOBSEN, Dale V. MSP No. A015249

This is to notify you of the decision of the State Board of Pardons in the matter of your parole consideration this date.

_____ 1. That you be paroled to any plan approved by the Field Officer.

_____ 2. That you be paroled subject to the following special conditions:

_____

✓ 3. That your case be continued until Discharge of Sentence because of:

- ☐ Poor institutional conduct record.
- ☐ Poor institutional work record.
- ☐ Past criminal history.
- ☑ Nature of offense.
- ☐ Inadequate parole plan.
- ☐ Lack of treatment in plan.
- ☑ Other It is the opinion of the Board that a sentence of ten years is adequate punishment for the crime committed.

FURTHER COMMENTS:

The action noted above is taken by the Board of Pardons on your application for parole. Any misconduct may result in change of favorable action.

By H. E. Burgess
State Board of Pardons

cc: Records Clerk
File
AP & P

BEST AVAILABLE COPY

Filed: January 9, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

GEORGE ALLEN and DALE JACOBSEN, on their own behalf and on behalf of all other persons similarly situated,	:	
Plaintiffs,	:	MEMORANDUM AND ORDER
vs.	:	
BOARD OF PARDONS, HENRY E. BURGESS, Chairman,	:	No. CV-84-78-BU
Defendants.	:	

Plaintiffs George Allen and Dale Jacobsen filed this action pursuant to 42 U.S.C. §1983 charging the state parole board and its chairman with violating their civil rights.

Specifically, the complaint alleges defendants deprived plaintiffs of due process when the board denied parole to each of them. The plaintiffs contend the board does not apply the proper criteria in determining parole eligibility and fails to adequately explain its reasons for denying parole.

Plaintiffs seek declaratory and injunctive relief as well as damages. They also request class action certification. The defendants move the court to dismiss the action for failing to state any deprivation of federally–secured rights.

This matter initially was referred to the United States Magistrate for proposed findings. Relying on this court's decision in *Campbell v. Montana State Board of Pardons*, 470 F.Supp. 1301 (D. Mont. 1979), the Magistrate recommends the case be dismissed. The court now considers that recommendation and plaintiffs' objections to it.

The court concludes that plaintiffs have failed to state a claim upon which relief may be granted. It is well settled that prisoners have no constitutional or inherent right to parole. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). State statutes, however, may create liberty interests that are entitled to the

procedural protections of the Due Process Clause of the Fourteenth Amendment.

In *Greenholtz*, the Supreme Court rejected the argument that a reasonable entitlement to due process is created whenever a state provides for the mere possibility of parole. Rather, the Court determined that the mandatory nature of the particular language of the Nebraska parole statute creates an expectancy of parole and triggers the need to observe due process requirements. The Nebraska scheme giving rise to this limited liberty interest provides that the parole board "shall" release an inmate unless one of the four designated reasons are found. In addition, the Nebraska scheme requires the parole board to consider fourteen statutory factors. The Supreme Court added the following cautionary note to its *Greenholtz* opinion:

> However, we emphasize that this statute has unique structure and language, and thus whether any other state statute provides a protectible entitlement must be decided on a case–by–case basis.

442 U.S. at 12.

Thus, in the instant case, Montana's statutory parole scheme must be examined to determine whether it provides

sufficient certainty of release to entitle a prisoner to some measure of due process protection in connection with the parole board's decision. The Montana parole statute, Mont. Code. Ann. §46–23–201, provides in relevant part:

> (1)...[T]he board shall release on parole any person confined in the Montana State [*sic*] prison when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or the community.
>
> (2) A parole shall be ordered only for the best interests of society ... A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law–abiding citizen.

This statute was construed in the similar case of *Campbell v. Montana State Board of Pardons* , 470 F.Supp. 1301 (D. Mont. 1979). In *Campbell*, Judge Smith concluded that parole under the Montana statutory scheme depends entirely on the discretion of the board. 470 F.Supp. at 1302. Thus, the statute creates no entitlement to due process protections.

Plaintiffs concede *Campbell* resolves the threshold issue presented herein. Plaintiffs argue, however, that the

repeated appearance of the word "shall" in the above–cited statute creates an expectation of parole. They ask the court to overrule the holding in *Campbell*.

The court is not persuaded by plaintiffs' argument. An examination of the Montana parole provision reveals that vast discretion is vested in the board. The appearance of the word "shall" is misleading at best. The board's discretion is limited only by general references to considerations such as "the best interests of society" and the "board's belief that a prisoner is able and willing to be a law–abiding citizen." The Montana statute lists no factors required to be considered by the parole board. Parole under the Montana system appears largely a judgment call. The court determines that the Montana statutory scheme creates only the possibility of parole, not the entitlement to it. The board itself decides what factors to apply on a case–by–case basis. In the court's opinion, the parole statute does not provide certain enough guidance to the board to create anything but the mere possibility of release dependent on the board's discretion. Under the *Greenholtz* rule, plaintiffs were not entitled to due process protections in connection with the board's denial of parole.

The court, therefore, will grant defendants' motion to dismiss the action. This conclusion renders resolution of defendants' remaining motions unnecessary.

IT IS ORDERED and this does order that defendants' motion to dismiss for failure to state a claim upon which relief can be granted is GRANTED.

Done and dated this 8th day of January, 1985.

W. D. Murray
Senior United States District Judge

Filed: June 26, 1986

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ALLEN and DALE JACOBSEN, on their own behalf and on behalf of all other persons similarly situated,	)	No. 85–3600
	)	D.C. # CV–84–78–BU
Plaintiffs–Appellants,	)	
v.	)	OPINION
BOARD OF PARDONS; HENRY E. BURGESS, Chairman,	)	
Defendants–Appellees.	)	

Appeal from the United States District Court
for the District of Montana
W. D. Murray, Senior District Judge, Presiding
Argued and submitted October 10, 1985
San Francisco, California

Before: SNEED, SCHROEDER, and BRUNETTI, Circuit Judges.

SCHROEDER, Circuit Judge.

The appellants seek to maintain a class action under 42 U.S.C. § 1983 on behalf of "all present and future

inmates of the Montana State Prison who are now or may become eligible for parole." They seek to show that the Montana Board of Pardons is failing to use proper standards for determining parole eligibility and thereby denying prisoners due process of law as guaranteed by the fourteenth amendment of the Constitution.

Appellants' suit is one of many which followed in the wake of the Supreme Court's decision in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). The Supreme Court there held that a state prison inmate does not have a federally guaranteed right to parole. *Id.* It also held that a state, through its own enactments, can create an "expectancy of release," which is a liberty interest entitling inmates to some due process protections before parole is denied. 442 U.S. at 12; *see also Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that state statute granting good–time credits to inmates created a liberty interest protected by due process guarantees).

The district court dismissed appellants' action. It concluded that the Montana statute did not create a liberty interest because it made the granting of parole too dependent upon the exercise of Parole Board discretion. The district court in this case followed *Campbell v. Montana State Board of Pardons*, 470 F. Supp. 1301 (D. Mont. 1979), a one–paragraph opinion stating that the Montana statute did not create a liberty interest in parole.

The only issue before us is whether the Montana statute creates a protected liberty interest. This is a question of law which we must determine under the standards of *Greenholtz*, as illuminated by the decisions of other federal courts in cases spawned by *Greenholtz*. It is a question which must be decided by examining the particular provisions of the state enactment in question, pursuant to *Greenholtz*'s admonition to proceed on a case–by–case basis. *Greenholtz*, 442 U.S. at 12. We hold that the Montana statute does create such a liberty interest and therefore we reverse the district court.

In *Greenholtz*, the Nebraska statute which the Court held conferred a due process entitlement provided:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment . . . in the facility will

> substantially enhance his capacity to lead a law–abiding life when released at a later date.

Neb. Rev. Stat. § 83–1,114(1) (1976).

The Supreme Court in *Greenholtz* focused upon the structure of that statute. By using the word "shall," it mandates parole unless the Board determines that one or more enumerated reasons exist which would make parole unwise in the given case. The Court recognized that the statute vests very broad discretion in the Board and "is necessarily subjective in part and predictive in part." 442 U.S. at 13.

The Montana statute is similar in structure to the Nebraska statute in *Greenholtz*. The Montana statute provides:

> (1) Subject to the following restrictions, the board shall release on parole . . . any person confined in the Montana state prison . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community:
>
> (a) No convict . . . may be paroled until he has served at least one–half of his full term, . . . except that a convict designated as a nondangerous offender . . . may be paroled after he has served one–quarter of his full term . . . . Any offender serving a time sentence may be paroled after he has served . . . $17^1/_2$ years.

> (b) No convict serving a life sentence may be paroled until he has served 30 years . . . .
>
> (2) A parole shall be ordered only for the best interest of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law–abiding citizen.

Mont. Code Ann. § 46–23–201.

The Montana statute, like the Nebraska statute in *Greenholtz*, uses mandatory language. It states that the Board "shall" release a prisoner on parole when it determines release would not be harmful, unless specified conditions exist which would preclude parole. There is no doubt that it, like the Nebraska provision in *Greenholtz*, vests great discretion in the Board. Under both statutes the Board must make difficult and highly subjective decisions about risks of releasing inmates. However, the Board may not deny parole under either statute once it determines that harm is not probable.

The only post–*Greenholtz* case in which this court has considered a parole statute is *Bowles v. Tennant*, 613 F.2d 776 (9th Cir. 1980). There we examined the federal parole statute, 18 U.S.C. § 4206(a). We noted there that the federal statute, like the Nebraska statute in *Greenholtz*, has mandatory language which we termed "[a]n important factor" in deciding whether a statute creates an expectation of

parole sufficient to create a protected liberty interest. *Bowles*, 613 F. 2d at 778. We also observed that the federal statute contains a qualifying provision allowing the Commission to deny parole for "good cause," regardless of the guidelines set forth elsewhere in the statute. Because of that proviso, we concluded that the federal statute provides an expectation of parole "no greater than that provided by the Nebraska statute." *Id.* We did not decide whether or not it created a liberty interest, because we concluded that the Parole Commission in that case had provided all of the due process required in *Greenholtz*.

The Montana statute contains the key mandatory language discussed in *Greenholtz*. It does not contain a proviso like that in the federal statute removing limitations on the reasons for denying parole. Following our analysis in *Bowles*, we conclude that the Montana statute creates an expectation of parole greater than that created by the federal statute.

In *Baumann v. Arizona Department of Corrections*, 754 F.2d 841, 843–45 (9th Cir. 1985), we considered the Arizona work furlough program. The program was administered under regulations which did not contain any criteria limiting the discretion of officials and thus did not mandate the Department of Corrections to provide work furlough when criteria were met. We held that a mandatory formulation was crucial to creation of a constitutionally protected liberty interest, and held that none had been created

in that case. Because the Montana statute has a mandatory requirement for parole release when its criteria are satisfied, *Baumann* does not support the position of the Montana Board in this case.

An examination of decisions in other circuits shows a fairly clear decisional pattern in post–*Greenholtz* decisions considering various state parole statutes. Those state enactments which courts have held do not create a liberty interest do not have mandatory language that parole "shall" be granted when given criteria are met. *See, e.g., Peck v. Battey*, 721 F.2d 1157 (8th Cir. 1983) (South Dakota statute establishes no criteria for assessing parole eligibility); *Williams v. Briscoe* , 641 F.2d 274 (5th Cir.), *cert. denied*, 454 U.S. 854 (1981) (Texas statute provided that parole panel *may* recommend parole); *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979) (Ohio Board *may* grant parole if it believes it would further the interests of justice and be consistent with society's welfare); *Shirley v. Chestnut*, 603 F.2d 805 (10th Cir. 1979) (Oklahoma statute establishes no criteria for assessing parole eligibility).

On the other hand, those state enactments which circuits have held do create a liberty interest generally have contained either a mandatory provision that parole shall be granted when criteria are met, or have expressly created a presumption of eligibility unless certain negative criteria are found. *See Mayes v. Trammell*, 751 F.2d 175 (6th Cir. 1984) (Tennessee parole rules create presumption of

eligibility, subject to finding of listed adverse factors); *Williams v. Missouri Board of Probation and Parole*, 661 F.2d 697 (8th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). In *Williams* the Eighth Circuit held that the Missouri parole statute then in effect created a protected liberty interest by providing that "[w]hen in [the Board's] opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the Board shall release on parole any person confined . . . ." Mo. Rev. Stat. § 549.261.[1]

The key language of that Missouri statute is virtually identical to the Montana parole statute before us. Given the similarities between the Montana statute and the Missouri statute considered in *Williams*, any decision other than the one we reach would squarely conflict with the Eighth Circuit's decision in *Williams*.

---

[1]Missouri amended its parole statute after the Eighth Circuit's decision in *Williams v. Missouri Board of Probation and Parole* , 661 F.2d 697 (8th Cir. 1981). The current statute, Mo. Rev. Stat. § 217.690 (Supp. 1982), provides:

> When in its opinion there is a reasonable probability that an inmate . . . can be released without detriment to the community or to himself, the board *may in its discretion* release or parole such person. (emphasis added).

The Eighth Circuit has held that the new statute is materially different from the previous one, and does not create a protected liberty interest in parole. *Gale v. Moore*, 763 F.2d 341, 343 (8th Cir. 1985).

The Seventh Circuit has found a liberty interest in an Illinois statute that appears to grant even more discretion to its parole board than does either the Montana or the Missouri statute. *Scott v. Illinois Parole and Pardon Board*, 669 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1048 (1982). The Illinois statute provided that the Board "shall not" parole a person if it determines that he would not conform to conditions of parole or his release would deprecate the seriousness of his offense or would have an adverse affect [*sic*] on institutional discipline. Ill. Rev. Stat. Ch. 38, § 1003–3–5(c).

There is at least one decision which has gone even farther. In *Winsett v. McGinnes*, 617 F.2d 996 (3d Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1093 (1981), the Third Circuit analyzed a work release program which contained no mandatory language or presumptions of release. It held that a liberty interest under the program arises when a prisoner satisfies eligibility requirements and when the exercise of prison officials' discretion "is consistent with work release policy." *Id.* at 1007. Justice White's opinion dissenting from denial of certiorari notes a conflict between it and other circuits' decisions. 449 U.S. at 1095.

Our opinion in *Baumann* rejected the Third Circuit's approach in *Winsett*, 754 F.2d at 844–45, and we do not follow it here. We follow instead the guidelines which have developed from *Greenholtz* and the decisions of our own

and other circuits in holding that the statute in question here does create a liberty interest in parole. Any discussion of the nature of the process which is due the appellants or whether Montana's present procedures accord that due process is premature. We hold only that the appellants state a claim upon which relief can be granted.[2]

Reversed and remanded for further proceedings.

---

[2]Both named plaintiffs were released on parole after this suit was filed. However, because the complaint seeks compensatory damages in addition to declaratory and injunctive relief, the appeal is not moot. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 57.13, at 57–116 (2d ed. 1985) (claim for money damages not moot even if claims for declaratory and injunctive relief based on same injury are moot).

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-461

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOARD OF PARDONS;
HENRY BURGESS, Chairman,

Petitioners,

v.

GEORGE ALLEN and DALE JACOBSEN,
on their own behalf and on behalf of
all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Mont. Code Ann. § 46-23-201(1) and (2) (1985) creates a liberty interest entitlement in parole release subject to protection under the due process clause of the Fourteenth Amendment to the United States Constitution.

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No. 86-461

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOARD OF PARDONS;
HENRY BURGESS, Chairman,

Petitioners,

v.

GEORGE ALLEN and DALE JACOBSEN,
on their own behalf and on behalf of
all other persons similarly situated,

Respondents.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 19a) is reported at 792 F.2d 1404. The opinion of the District Court (J.A. 13a) is not officially reported.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals' judgment was entered on June 26, 1986, and the petition for writ of certiorari timely docketed under 28 U.S.C. § 2101(c) on September 18, 1986. The petition was granted on November 10, 1986.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Mont. Code Ann. § 46-23-201(1) and (2) (1985):

> *Prisoners eligible for parole.* (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison or the women's correction center, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community:
>
> (a) No convict serving a time sentence may be paroled until he has served at least one-half of his full term, less the good time allowance provided for in 53-30-105; except that a convict designated as a nondangerous offender under 46-18-404 may be paroled after he has served one-quarter of his full term, less the good time allowance provided for in 53-30-105. Any offender serving a time sentence may be paroled after he has served, upon his term of sentence, $17^{1}/_{2}$ years.
>
> (b) No convict serving a life sentence may be paroled until he has served 30 years, less the good time allowance provided for in 53-30-105.
>
> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

STATEMENT OF THE CASE

The complaint below was filed on May 29, 1984, and requested class certification under Fed. R. Civ. P. 23(b)(1) and (2) on behalf of "all present and future inmates of the Montana State Prison who are now or who may become eligible for parole." (J.A. 14a.) It asserted

jurisdiction under 28 U.S.C. § 1343(3) and alleged three claims for relief under 42 U.S.C. § 1983: (1) The petitioners "failed to use proper standards for determining [the respondents'] eligibility for parole" in violation of the due process clause of the Fourteenth Amendment; (2) the petitioners "failed to adequately explain the reasons for denying parole" to the respondents in violation of the due process clause; and (3) the petitioners "are causing [the respondents] to suffer more punishment than intended by the [Montana] Legislature in that their applications for parole have not been fairly considered" in violation of the Eighth and Fourteenth Amendments. (J.A. 6a-7a.) The principal factual allegations underlying these claims were: (1) the petitioners denied the respondents' parole applications without expressly finding "that they are unable or unwilling to fulfill the obligations of a law-abiding citizen or constitute a detriment to themselves or to the community"; (2) the petitioners failed to make "an individual determination ... of each prisoner's ability to fulfill the obligations of a law-abiding citizen"; and (3) the petitioners failed to utilize proper standards in determining a prisoner's parole eligibility or to explain adequately their reasons for denying parole. (J.A.

5a-6a.)[1] The complaint requested injunctive, declaratory and compensatory damages relief.

The petitioners moved to dismiss the complaint on July 2, 1984. On November 30, 1984, the magistrate recommended dismissal for failure to state a claim and did not address, *inter alia*, whether the suit should proceed as a class action. The respondents submitted objections to the recommendation, but by memorandum and order filed January 9, 1985, the District Court concurred with the magistrate. The court reasoned that, under *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), it was required to determine the existence of any constitutionally-protected entitlement interest in parole release with reference to Mont. Code Ann. § 46-23-201(1)

[1] Attached to the complaint as appendices were (1) a November 29, 1982, communication to respondent Allen from the petitioners notifying him that his parole-release application had been denied because of the "[n]ature of the offense," (2) a September 29, 1982, communication to respondent Jacobsen from the petitioners notifying him that his parole-release application had been denied because of the "[n]ature of the offense," and (3) a November 30, 1983, communication to respondent Allen from the petitioners stating that "[a]t the annual review of your case there was no change in the former disposition due to the nature of your offense." (J.A. 9a-11a.) The September 29 and November 29, 1982, communications also recommended commencement or continuation of psychological therapy programs by the respondents.

and (2) (1983).[2] The court thereafter rejected the respondents' contention that such provision established "an expectation of parole" because it utilized the auxiliary verb "shall" in connection with the granting of parole if certain findings were made:

> An examination of the Montana parole provision reveals that vast discretion is vested in the board. The appearance of the word "shall" is misleading at best. The board's discretion is limited only by general reference to considerations such as "the best interests of society" and "the board's belief that a prisoner is able and willing to be a law-abiding citizen" [*sic*]. The Montana statute

[2] In relevant part, section 46-23-201(1) and (2) provided then, as now:

> (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison or the women's correction center ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community:
>
> ....
>
> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

> lists no factors required to be considered by the parole board. Parole under the Montana system appears largely a judgment call. The court determines that the Montana statutory scheme creates only the possibility of parole, not the entitlement to it. The board itself decides what factors to apply on a case-by-case basis. In the court's opinion, the statute does not provide certain enough guidance to the board to create anything but the mere possibility of release dependent on the board's discretion. Under the *Greenholtz* rule, plaintiffs were not entitled to due process protections in connection with the board's denial of parole. [J.A. 17a.]

The District Court expressly followed *Campbell v. Montana State Board of Pardons*, 470 F. Supp. 1301 (D. Mont. 1979), which had found no protected liberty interest in parole release under section 46-23-201.

The respondents appealed the complaint's dismissal, asserting as the only issue whether a liberty interest in parole release protected under the Fourteenth Amendment was created by section 46-23-201. On June 26, 1986, the Court of Appeals reversed the District Court's judgment and held that the statute did establish such an interest. (J.A. 21a, 27a-28a.) It stated that, in *Greenholtz*, this Court focused upon "the structure of [the Nebraska] statute" which, "[b]y using the word 'shall,'... mandates parole unless the Board [of Parole] determines that one or more enumerated reasons exist ... mak[ing] parole unwise in the given case." (J.A. 22a.) The court found section 46-23-201 "similar in structure to the Nebraska statute" because "[i]t states that the

board 'shall' release a prisoner on parole when it determines release would not be harmful, unless specified conditions exist which would preclude parole." (J.A. 23a.) The Court of Appeals further concluded that its holding was consistent with the results from other circuits applying *Greenholtz*:

> An examination of decisions in other circuits shows a fairly clear decisional pattern in post-*Greenholtz* decisions considering various state parole statutes. Those state enactments which courts have held do not create a liberty interest do not have mandatory language that parole "shall" be granted when given criteria are met. ...
>
> On the other hand, those state enactments which circuits have held do create a liberty interest generally have contained either a mandatory provision that parole shall be granted when criteria are met, or have expressly created a presumption of eligibility unless certain negative criteria are found. ... [J.A. 25a] [citations omitted].

The court recognized that the broad standards under the Montana statute vested the petitioners with "great discretion" and thus rested its determination that the statute created a parole-release entitlement protected under the Fourteenth

Amendment solely upon use of "shall ... when" in section 46-23-201(1). (J.A. 23a.)[3]

SUMMARY OF THE ARGUMENT

The existence of a reasonable expectation of parole release upon serving the statutorily-required minimun amount of imprisonment is the controlling consideration in determining whether a liberty interest protected under the Fourteenth Amendment's due process clause has been

[3]As the Court of Appeals noted, the respondents were granted parole subsequent to the complaint's filing. (J.A. 28a n.2.) The court, however, further observed that, because the complaint sought compensatory damages in addition to injunctive and declaratory relief, the action was not moot. It should nonetheless be emphasized that, aside from asserting that the Board of Pardons was not a "person" under 42 U.S.C. § 1983, the petitioners moved to strike the damages claim on the basis of their alleged absolute immunity; the District Court, in granting the motion to dismiss for failure to state a claim, did not reach these issues. Unquestionably any relief is barred against the Board since it is an agency of the State, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984), but as to petitioner Burgess, who was sued in both his individual and official capacities (J.A. 5a), "the validity of respondents' claim for damages is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978). *See Cleavinger v. Saxner*, 106 S. Ct. 496, 500 (1985) (stating that "this Court has not decided whether state parole officials enjoy absolute immunity as a matter of federal law"); *Martinez v. California*, 444 U.S. 277, 284 (1980) (finding it "unnecessary for us to decide any question concerning the immunity of state parole officials because ... '[t]he first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right "secured by the Constitution and laws"' of the United States"). The Court of Appeals therefore properly concluded that this matter is not moot.

created by Mont. Code Ann. § 46-23-201. Such an expectation is not present here because of the broad, highly subjective criteria which govern parole decisions under the Montana statute and which effectively vest the petitioners with authority to deny release for any constitutionally permissible reason. The respondents therefore possessed, at most, the hope that their applications would be favorably acted upon--a unilateral expectation which has never been held sufficient to establish a protectible interest under the due process clause.

This conclusion is consistent with, and required by, *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, supra*. There, after finding no constitutional or inherent right to parole release, the Court held that the mere possibilty of parole under a state statute does not give rise to a protected liberty interest. Its holding derived from the intensely subjective nature of parole decisionmaking generally and the concomitant lack of a reasonable expectancy on a particular prisoner's part that his application will be granted. While *Greenholtz* did find the involved Nebraska statute created a liberty interest, that determination was predicated on an inmate's presumptive right to parole release thereunder upon meeting minimum term-of-imprisonment eligibility requirements. Such presumptive right to release rendered the Nebraska law "unique," *Connecticut Board of Pardons v. Dumschat* , 452 U.S. 458, 466 (1981), and distinguishes it from virtually every other

parole statute in the United States. A review of the Court's prisoner cases discussing the existence of a state-law established liberty interest further establishes that no protected entitlement has been found without a presumptive right to it. Section 46-23-201 does not, however, embody a presumed right to parole but, instead, provides only for parole-release consideration under exceptionally broad, nonobjective criteria which demand largely predictive judgments concerning future conduct. The Court of Appeals' opinion deviates from *Greenholtz,* as well as from related decisions, and must therefore be reversed.

ARGUMENT

NO REASONABLE EXPECTATION OF PAROLE RELEASE IS CREATED BY MONT. CODE ANN. § 46-23-201, AND THUS NO LIBERTY INTEREST PROTECTED UNDER THE FOURTEENTH AMENDMENT EXISTS AS TO SUCH RELEASE.

A. Introduction.

Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, supra, conclusively determined that parole release is not, in itself, a liberty interest protected under the due process clause of the Fourteenth Amendment. "There is," the Court stated, "no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence ... [because] the conviction, with all its procedural safeguards, has

extinguished that liberty right" and because "there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determination." 442 U.S. at 7. The Court additionally observed that a state has no obligation to create a parole system and, if it does, "may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority." *Id.* at 7-8. Even where a parole system has been established, "few certainties exist" and each "decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." *Id.* at 8 (footnote omitted). The Court thus recognized two principles which would later

inform its analysis of whether the Nebraska statute[4] established a protectible liberty interest: (1) An inmate has no legitimate expectation of release from incarceration prior to the completion of his sentence absent positive state law to the contrary; and (2) the typically subjective, intuitive nature of parole decisionmaking vests such substantial discretion in the decisionmaker as to render unreasonable any expectation of an inmate that his application will be favorably acted upon.

Both principles are significant in determining whether a protected liberty interest arises under Mont. Code

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[4]Neb. Rev. Stat. § 83-1,114(1) (1976) provided:

> Whenever the Board of Parole considers the release of a committed offender, who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) there is substantial risk that he will not conform to the conditions of parole;
>
> (b) his release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) his release would have a substantially adverse effect on institutional discipline; or
>
> (d) his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Ann. § 46-23-201 and, while separately stated, are closely interrelated since the second is but a refinement of the first. Thus, not only does the Montana statute facially provide only the possibility of parole release, but that possibility is also made contingent upon the petitioners' exercise of admittedly great discretion under the most general and nonparticularized standards.[5] Section 46-23-201 accordingly falls clearly within that class of parole-release statutes which "holds out [only] the *possibility* of parole [and] provides no more than a mere hope that the benefit will be obtained." *Greenholtz*, 442 U.S. at 11 (emphasis in original). *Greenholtz* therefore requires reversal of the Court of Appeals' judgment--a conclusion compellingly supported by a review of this Court's recent decisions outlining the scope of prisoners' liberty-interest entitlements under state law.

[5] *Greenholtz* aptly described the nature of the petitioners' decisionmaking when it stated that "[t]he parole-release decision ... is more subtle [than a parole-revocation determination] and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experiences with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual. ... The decision turns on a 'discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.'" 442 U.S. at 9-10 (citation omitted).

B. Nature of State-Created Liberty Interests in Prisoner Cases.

It is now well established that the nature of a state-created interest, not its weight, controls whether it is subject to protection under the due process clause of the Fourteenth Amendment. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord Jago v. Van Curen* , 454 U.S. 14, 17 (1981) (*per curiam*); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 840-41 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). That parole-release denial may constitute a "grievous loss" consequently has no significance as to whether section 46-23-201 creates a protectible liberty interest. *Jago v. Van Curen, supra; Meachum v. Fano*, 427 U.S. 215, 224 (1976). It is equally settled that, in determining the nature of a claimed entitlement, the appropriate analysis is objective; the Court accordingly stated in *Board of Regents v. Roth*, 408 U.S. at 577:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. ...

Although *Roth* involved the question of whether a nontenured college teacher possessed a property interest in his contract renewal sufficient to warrant due process clause protection, this aspect of its "property" analysis has been

plied to various forms of state-created entitlements claimed by prisoners. *Jago v. Van Curen*, 454 U.S. at 17-18 (no protectible entitlement to parole even after favorable decision); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 462 (no legitimate expectation of life-sentence commutation); *Vitek v. Jones*, 445 U.S. 480, 489-91 (1980) (legitimate expectation of continued residence in general prison population); *Montanye v. Haymes*, 427 U.S. 236, 242-43 (1976) (no entitlement to continued incarceration at particular state prison); *Meachum v. Fano*, 427 U.S. at 228 (same); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (reasonable expectation of good time-credit accrual).[6] *Greenholtz*, moreover, recognized that, to warrant protection under the due process clause, an inmate's expectation of

[6]The term "liberty interest" has, as the text indicates, been used differently in prisoner-entitlement cases than in other contexts and does not refer exclusively to that interest which an individual has in avoiding stigmatization of his good name and reputation. *See, e.g., Codd v. Velger*, 429 U.S. 624, 627-28 (1976) (*per curiam*); *Bishop v. Wood*, 426 U.S. 341, 347-49 (1976); *Paul v. Davis*, 424 U.S. 693, 711-12 (1976); *Board of Regents v. Roth*, 408 U.S. at 473; *Wisconsin v. Constantineau*, 400 U.S. 432, 437 (1971). Although the Court recognized in *Vitek v. Jones*, 445 U.S. at 492-94, that certain administrative actions taken against an inmate may be so stigmatizing as to justify a hearing, parole-release denial cannot be viewed as ordinarily accompanied by such an effect, and the respondents have not predicated their due process clause claim on that theory. *Cf. Lane v. Williams*, 455 U.S. 624, 632-33 (1982) (mere presence of parole revocation on prison record did not constitute collateral consequence sufficient to vitiate mootness in habeas corpus proceeding).

parole release must be objectively predicated on more than a subjective hope of favorable action; *i.e.*, there must, at least under a typically-drawn parole statute where the decisionmakers are governed by general public interest and predictive release criteria, be a presumptive right to parole subject to the defeasance upon an affirmative finding that one or more statutory reasons for denial are present. *Greenholtz*, 442 U.S. at 11-12; *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 466-67.

The ordinary need for a presumptive right to a particular entitlement before a liberty interest arises is clearly reflected in a closer review of both pre- and post-*Greenholtz* decisions. In *Wolff v. McDonnell, supra*, the Court found a protected interest in good time credits created under Nebraska law because "the State itself not only provided the statutory right to good time but also specifies that it is to be forfeited only for serious misconduct." 418 U.S. at 557. It later commented that, "the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Ibid.*

The Court similarly found a protected interest against involuntary transfer from the general prison population to a mental hospital established under Nebraska statutes in *Vitek v. Jones, supra*. After noting prior decisions discussing the development of the liberty-interest doctrine, it said:

> We think the District Court properly understood and applied these decisions. Section 83-180(1) provides that if a designated physician finds that a prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment" in prison, the Director of Correctional Services may transfer a prisoner to a mental hospital. The District Court also found that in practice prisoners are transferred to a mental hospital only if it is determined that they suffer from a mental disease or defect that cannot adequately be treated within the penal complex. This "objective expectation, firmly fixed in state law and official Penal Complex practice," that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital. ...

445 U.S. at 489-90. The Court later commented that, "if the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, 'the determination of whether such behavior has occurred becomes critical, and

the minimum requirements of procedural due process appropriate for the circumstances must be observed.'" *Id.* at 490-91.

In *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court held as protected an inmate's interest in remaining in the general prison population because of Pennsylvania statutes which, in part, provided that "[a]n inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of serious disturbance, or a serious threat to the individual or others." *Id.* at 470 n.6. Observing that the state had "gone beyond simple procedural guidelines," the Court reasoned:

> It has used language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed ... and that administrative segregation will not occur absent specific substantive predicates--viz, "the need for control," or "the threat of a serious disturbance." Petitioners argue, with considerable force, that these terms must be read in light of the fact that the decision whether to confine an inmate to administrative segregation is largely predictive, and therefore it is not likely that the State meant to create binding requirements. But on balance we are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates

> demands a conclusion that the State has created a protected liberty interest.

Id. at 471-72. *Hewitt*, like *Wolff* and *Vitek*, thus exemplified a presumptive entitlement created by state law and subject to loss only upon an administrative finding that certain conditions existed; a Pennsylvania prisoner therefore had a reasonable expectation that he would not be administratively segregated unless those conditions were determined present.[7]

In contrast to these cases are those in which no legitimate expectancy of continued incarceration at a particular prison was found. *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Montanye v. Haymes, supra; Meachum v. Fano, supra.* *Meachum* and *Montanye* were companion cases addressing the question of intrastate prison transfer in,

[7]The Court's reasoning in *Wolff, Vitek* and *Hewitt* is closely analogous to that in nonprisoner cases where a state-created entitlement was held to be defeasible only upon a determination of cause--thereby giving rise to a protected property interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982) (right of action under state fair employment practice statute); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. at 11-12 (entitlement to continued utility service); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975) (entitlement of high school student to attend class); *Arnett v. Kennedy*, 416 U.S. 134, 166 (1974) (Powell, J., concurring) (entitlement to continued employment); *see Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972) (complaint's allegations sufficient to establish claim for entitlement to continued employment). These nonprisoner cases clearly reflect the need for, at the least, a presumptive entitlement as a condition to "property" status for due process clause purposes.

respectively, Massachusetts and New York under whose law the right of prison administrators to effect such transfer was unrestricted. In *Montanye*, 427 U.S. at 243, the Court agreed with New York's position "that under the law of that State Haymes had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct." It was equally succinct in *Meachum*, 427 U.S. at 228, commenting that "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."

Olim v. Wakinekona, supra, involved an interstate prison transfer from Hawaii to California. Unlike New York and Massachusetts, however, the Corrections Division of the Hawaii Department of Social Services and Housing had adopted inmate classification procedures which, in relevant part, provided a hearing before a program committee prior to a prison transfer. 461 U.S. at 241-42. The committee thereafter made a recommendation to an administrator who, in turn, was vested with the authority (1) to accept or reject the recommendation in whole or part or (2) "'...hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate..., other inmates ..., institution, or community and

refer the matter back to the Program Committee for further study and recommendation.'" *Id.* at 242-43. Rejecting the Court of Appeals' determination that the regulations established a property interest entitlement, the Court stated:

> [*Meachum* and *Montanye*] demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring). If the decisionmaker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," *ibid.*, the State has not created a constitutionally protected liberty interest. ...
>
> Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV makes clear, and as the Supreme Court of Hawaii has held ..., the prison administrator's discretion to transfer an inmate is completely unfettered. No standards govern or restrict the Administrator's determination. Because the Administrator is the only decisionmaker under Rule IV, we need not decide whether the introductory paragraph of Rule IV ... places any substantive limitations on the purely advisory Program Committee.
>
> The Court of Appeals thus erred in attributing significance to the fact that the prison

> regulations require a particular kind of hearing before the Administrator can exercise his unfettered discretion. ... Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. ... If officials may transfer a prisoner "for whatever reason or for no reason at all," ... there is no such interest for process to protect ...

Id. at 249-50 (footnotes and some citations omitted). Consequently, the highly discretionary nature of the administrator's decisionmaking authority negatived any reasonable expectation of an inmate that he would remain incarcerated in an Hawaii prison.[8]

The Court underscored the need for a claimed liberty interest to be predicated on positive state law in *Jago v. Van Curen, supra,* where a grant of "shock parole" was rescinded prior to the prisoner's actual release. The court of appeals had concluded that, while an inmate ordinarily possessed no liberty interest in parole under Ohio law, a reasonable expectancy interest arose by virtue of the initial

[8]Although *Olim* stressed that the administrator's discretion was completely unfettered, the decision hardly stands for the proposition that *any* limitation of official discretion--no matter how practically insignificant--creates a protected liberty interest. That official discretion is not totally absolute clearly does not, in itself, give rise to a protected interest because, absent a presumptive entitlement, the degree of discretion may be so substantial as to negative a reasonable expectancy that a particular status will be continued or granted.

release decision. 454 U.S. at 16-17. The lower court based this conclusion in substantial part on *Perry v. Sindermann,* 408 U.S. at 601, which held that a protected property interest could arise from "mutually explicit understandings." 454 U.S. at 16.

The court of appeals' reliance on *Sindermann,* however, was found inappropriate. The Court first stated that "the implied-contract aspect of *Sindermann* 'understandings' has been limited to the creation of property interests" but that "such principles [of contract law] do not ... so readily lend themselves to determining the existence of constitutionally protected liberty interests in the setting of prisoner parole." 454 U.S. at 18. The Court reasoned that applying such principles to the penal setting "would severely restrict the necessary flexibility of prison administrators and parole authorities" as to "their myriad decisions with respect to individual inmates." *Id.* at 19. The Court secondly rejected the notion that the Ohio parole authorities' initial decision established a kind of "industrial common-law" because liberty interests must be premised on concrete statutory or regulatory provisions. *Id.* at 19-20. In sum, since the involved inmate had no protected interest in parole release before the parole authorities' initial decision, that authority retained discretion to rescind its determination prior to actual release without implicating due process clause concerns.

The result in *Jago* was largely foreshadowed by *Connecticut Board of Pardons v. Dumschat, supra.* There the Court found specious a liberty-interest entitlement claim premised on the fact that three-fourths of applications for commutations of life sentences by Connecticut prisoners had historically been granted:

> No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution. The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency.

452 U.S. at 465. It then distinguished the parole-release statute in *Greenholtz*, stating that the absence of any standards controlling the Connecticut Board's disposition of commutation applications "contrasts dramatically with the Nebraska statutory procedures ... which expressly mandated that the Nebraska Board of Parole 'shall' order the inmate's release 'unless' it decided that one of four specified reasons for denial was applicable." *Id.* at 466. The Court reiterated this distinction in the following paragraph: "When Nebraska statutes directed that inmates who are eligible for parole 'shall' be released 'unless' a certain finding has been made, the statutes created a right. ..." *Id.* at 466-67. Taken together, *Dumschat* and *Olim* illustrate that a

constitutionally-protected expectancy right does not arise merely because favorable administrative action is possible--at least where no concrete and objective standards circumscribe the decisionmaker's discretion.

Greenholtz, as stated above, fits securely into the analytical schema of the post-*Roth* prisoner liberty-interest decisions. The Court's liberty-interest analysis was, as to the expectancy allegedly arising under the Nebraska statute, divided into two parts: (1) whether the mere possibility of parole under a state statute created a protectible liberty interest; and (2) whether the unique structure of the Nebraska statute established a reasonable expectation of parole release. Resolving the first issue negatively, the Court initially remarked on the necessarily subjective nature of the required decisionmaking, 442 U.S. at 9-10, and then distinguished *Morrissey v. Brewer, supra,* by quoting with approval from *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971): "'It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.'" *Id.* at 10. The Court thus explicitly recognized that an inmate will ordinarily have no reasonable expectation of parole because of the complex and substantially intuitive decisionmaking attendant to parole-release determinations. Only under an extraordinary statute would such an expectation arise.

The Nebraska law proved to be just that exception because of its "shall ... unless" formulation. 442 U.S. at 11-12. The respondents in *Greenholtz* noted this syntactical structure and argued:

> Nebraska has not only statutorily created the inmate's right to be considered for parole, but in addition has prescribed specific factors which must be considered and the criteria which must be present before parole can be denied. *Under the Nebraska statutory scheme, an inmate must be released on parole unless the Board finds the individual unfit for parole because one or more specified criteria are present.* ... The Nebraska statute clearly limits the discretion of the Board in denying parole, and thus, the expectation the inmate has in being granted parole triggers procedural due process protection. ...

Brief for the Respondents, O.T. 1978, No. 78-201, pp. 24-25 (emphasis added); *see also id.*, pp. 26 n.12, 37-38. The uniquely presumptive nature of parole release under the Nebraska statute had earlier been identified by the United

States, appearing as *amicus curiae*, as separating it from, *inter alia*, 18 U.S.C. § 4206(a)[9]:

> Unless a parole system sets up a presumption in favor of release or specifies particular facts that govern the release decision, the parole system could not involve a legitimate claim of entitlement to release. So long as this system of release is fundamentally an exercise of informed discretion, no fact or set of facts that a prisoner could prove would establish an entitlement to have parole authorities place

[9]18 U.S.C. § 4206(a) (1985) provides:

> If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare;
>
> subject to the provisions of subsections (b) and (c) of this section and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

Section 4206(c) further provides in relevant part that "[t]he Commission may grant or deny a release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing. ..."

> trust in his character or believe that the interests of society require his release. Because the parole decision usually is not controlled by any particular controvertible facts, prisoners usually have no liberty or property interest in being granted parole at any particular time.
>
> Nebraska law, however, follows a different pattern. The pertinent statute ... provides that every prisoner shall have a release hearing "within sixty days before the expiration of his minimum term less any reductions." Neb. Rev. Stat. § 83-1,114(1) (1976), then provides that "[w]henever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because [of one of several enumerated possibilities.]" These two statutes, read together, give every Nebraska prisoner a legitimate claim of entitlement to release on parole, subject to defeasance only if the parole authorities find one of a limited number of things.

Brief for the United States as Amicus Curiae, *id.*, pp. 32-35 (footnote omitted). The Court clearly accepted these analyses in finding an "expectancy of release ... entitled to some measure of constitutional protection." 442 U.S. at 12.

It is patently evident that, without the presumptive entitlement to parole release established under the Nebraska law, no protected liberty interest would have been deemed present in *Greenholtz*. Absent that presumption the statute would have been substantially similar not only to 18 U.S.C.

§ 4206(a) but also to statutes in many other jurisdictions which predicate parole-release decisions on comparably broad criteria.[10] These criteria are, as the Eighth Circuit has commented, so generalized as "to leave a [parole board] with almost unlimited discretion." *Parker v. Corrothers*, 750 F.2d 653, 657 (1984); *see also Williams v. Briscoe*, 641 F.2d 274, 276-77 (5th Cir.), *cert. denied*, 454 U.S. 854 (1981); *Booth v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979). The presence of such discretion is directly incompatible with any legitimate claim of a protected expectancy interest.

Quite obviously, therefore, the Nebraska statute's use of "shall" cannot, for liberty interest-analysis purposes, be isolated from its syntactical relationship with "unless."

[10]As stated in the petition herein at 13 n.4, the Nebraska statute was derived from the Model Penal Code. No other state has followed Nebraska's example. The Model Code's general parole-release criteria are not, however, *sui generis*. *See, e.g.*, Ala. Code § 15-22-26 (1982); Alaska Stat. § 33.16.100 (1986); Del. Code Ann. tit. 11, § 4347(c) (1984 Cum. Supp.); D.C. Code Ann. § 24.204(a) (1981); Fla. Stat. Ann. § 947.18 (West 1985); Hawaii Rev. Stat. § 353-69 (1985); Ida. Code § 20-223(c) (1986 Supp.); Iowa Code § 906.4 (1985); Kan. Stat. Ann. § 22-3717(h) (1985 Supp.); Ky. Rev. Stat. § 439.340(2) (1986 Cum. Supp.); La. Rev. Stat. Ann. § 15:574.4.E (West 1984); Mass. Gen. Laws Ann. ch. 127, § 130 (West 1974); Miss. Code Ann. § 47-7-17 (1985 Supp); Nev. Rev. Stat. § 213.1099.1 (1986); N.Y. Exec. Law §259-i2(c) (McKinney 1986 Supp.); N. C. Gen. Stat. § 15A-1371(d) (1983); Ohio Rev. Code § 2967.03 (Page 1985 Supp.); Tenn. Code Ann. § 40-28-117(a) (1982); Tex. Code Crim. P. art. 42.12, § 15(f) (Vernon 1979); Vt. Stat. Ann. tit. 28, § 501 (1985 Supp.).

The unique juxtaposition of the subordinate clause beginning with "unless" with the words "it shall order his release" established a statutory presumption, without which no entitlement would have arisen. This conclusion, otherwise apparent from a simple reading of the statute, has been reached by various circuits. *E.g., Berard v. Vermont Parole Board*, 730 F.2d 71, 75 (2d Cir. 1984); *Booth v. Hammock*, 605 F.2d at 664; *Williams v. Briscoe*, 641 F.2d at 277; *Mayes v. Trammel*, 751 F.2d 175, 177 (6th Cir. 1984); *United States ex rel. Scott v. Illinois Parole & Pardon Board*, 669 F.2d 1185, 1190 (7th Cir.) (*per curiam*), *cert. denied*, 459 U.S. 1048 (1982); *Thomas v. Sellers*, 691 F.2d 487, 488 (11th Cir. 1983) (*per curiam*). Even a different panel of the Ninth Circuit has recognized the analytically controlling nature of the "shall ... unless" formulation in *Greenholtz*. *Bauman v. Arizona Department of Corrections*, 754 F.2d 841, 844 (1985). The present significance of these decisions is clear: The discretion of parole-release decisionmakers is so substantial under typically used criteria that, but for a presumptive right to parole, the affected inmate can claim no reasonable expectancy of favorable action on his application; rather, his only entitlement is, after serving the required period of qualifying incarceration, to parole-release consideration. Consequently, while use of "may" could, at least theoretically, expand that discretion somewhat, the expansion has no practical impact for due process clause-entitlement purposes because, without it, a

parole-board member will still engage in precisely the same "synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best for the individual inmate and for the community." *Greenholtz*, 442 U.S. at 8. The breadth of this inherent discretion negatives whatever significance use of the mandatory "shall" may have in a statute worded similarly to the introductory paragraph in section 46-23-201(1).[11]

C. Absence of a Liberty-Interest Entitlement Under Section 46-23-201.

Section 46-23-201(1) and (2) provides, in relevant part, that the petitioner Board "shall release on parole" an inmate "when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community" and that "parole shall be

[11] Absent a statutorily-created presumptive right to parole as in *Greenholtz*, it seems clear that a reasonable expectancy interest in release could only arise if the decisionmaker's discretion was essentially limited to resolving simple factual questions, thereby obviating the need for exercising the profound degree of predictive judgment presently required by parole statutes in the United States. Under such a law a prisoner could arguably rely on a favorable outcome if he satisfied the various factual predicates for release. Instantly, however, the Court need not speculate on how a nonpresumptive statute must necessarily be structured to create a protected liberty interest since section 46-23-201 indisputably vests the petitioners with immense, and typical, judgmental discretion in resolving parole-release applications.

ordered only for the best interests of society" and "only when the board believes [the prisoner] is able and willing to fulfill the obligations of a law-abiding citizen."[12] Although the Montana Supreme Court has not considered the precise issue of whether section 46-23-201 creates a liberty-interest entitlement for procedural due process purposes, the court has consistently held that, under this statute, parole is a discretionarily-granted privilege and not a statutorily-secured right. *Cavanaugh v. Crist*, 189 Mont. 274, 281, 615 P.2d 890, 895 (1980) ("[p]arole and participation in the furlough program, both of which relate to punishment, are privileges—matters of grace, not rights"); *Lopez v. Crist*, 176 Mont. 352, 354, 578 P.2d 312, 314 (1978) ("[p]arole is a matter of grace, not of right"); *In re Hart*, 145 Mont. 203, 206, 399 P.2d 984, 985 (1965) ("[p]arole is a privilege, not a right"); *State ex rel. Herman v. Powell*, 139 Mont. 583,

[12] The Court of Appeals construed section 46-23-201 as requiring a prisoner's release when the Board "determine[s] release would not be harmful, unless specified conditions exist which would preclude parole." (J.A. 23a.) That construction misstates the statute's operation. The parole requirements of section 46-23-201(1) and (2) must be taken together and authorize release only when the Board believes, as indicated in the text, (1) "there is reasonable probability that the prisoner can be released without detriment to [himself] or to the community;" (2) "the best interests of society" will be furthered; and (3) the prisoner "is able and willing to fulfill the obligations of a law-abiding citizen." Each of these conditions must be determined to exist before parole release may occur. Thus, no presumptive right to parole arises, as the Court of Appeals apparently suggests, if the Board concludes a prisoner can be released without detriment to himself or the community.

589, 367 P.2d 553, 556 (1961) ("'[T]he granting of parole is not a matter of right but is a matter of grace, privilege, or clemency granted to the deserving, and withheld from the undeserving, as sound discretion may dictate.'... A prisoner is not entitled to release as a matter of right until he has completed his maximum sentence"). The petitioner Board, through its regulations, has also recognized the principle that no presumptive entitlement to parole exists. Mont. Admin. R. §§ 20.25.201(2) to (4), 20.25.401(3) to (4), 20.25.505.[13]

Little question can exist that, under those liberty-interest principles discussed above, section 46-23-201 does not create a reasonable expectation of parole release. Not only is the presumptive entitlement present under the Nebraska statute lacking, but "there is no prescribed or defined combination of facts which, if shown, would mandate release on parole." *Greenholtz*, 442 U.S. at 8. The petitioner Board is instead vested with essentially unlimited discretion in weighing discrete facts, intuitive impressions, and personal experience to determine whether, *inter alia*, "the best interests of society" will be advanced by a parole release

[13]The Board's regulations are annexed as an attachment to the Brief of Appellees before the Court of Appeals.

in any particular case.[14] The broad criteria under which the Board operates accordingly permit it to deny parole on any ground, otherwise constitutionally permissible, deemed appropriate.[15] An inmate therefore can anticipate that his parole-release application will be considered; he can, though, claim no reasonable expectation that such application will be favorably acted upon in view of the Board's admittedly great discretion. Consequently, no liberty interest protectible

[14]The Court of Appeals distinguished section 46-23-201 from 18 U.S.C. § 4206 because of the latter's authorization to deny parole for "good cause" under subsection (c) and concluded that "the Montana statute creates an expectation of parole greater than that created by the federal statute." (J.A. 24a.) The court's reasoning is conclusory and obviously flawed. 18 U.S.C. § 4206(a) establishes two basic standards for parole release: (1) The release must not "depreciate the seriousness of [the prisoner's] offense or promote disrespect for the law," and (2) the release must "not jeopardize the public welfare." The parole-release standards under section 46-23-201 are, however, equally broad and unquestionably permit parole denial on any ground available to the United States Parole Commission under 18 U.S.C. § 4206(a). The "for cause" exception in section 4206(c) does not expand the general policy criteria in subsection (a) but, rather, simply authorizes the United States Parole Commission to depart from its parole-release guidelines. *See* 28 C.F.R. § 2.20 (1986); H. Conf. Rep. No. 838, 94th Cong., 2d Sess. 27, *reprinted in* 1976 U.S. Code Cong. & Ad. News 351, 359.

[15]The complaint alleges that the respondents' parole denials on the basis of the "nature of the offense" were somehow inconsistent with section 46-23-201. (J.A. 5a.) Nonetheless, the nature of a particular offense may obviously be viewed by the petitioners as dispositive of, *inter alia*, whether a prisoner's release may be detrimental to the community or not in furtherance of the best interests of society.

under the Fourteenth Amendment's due process clause arises under section 46-23-201.

CONCLUSION

The petitioners respectfully request that the judgment of the Court of Appeals be reversed.

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RESPONDENT'S

BRIEF

(6)

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October Term, 1986

BOARD OF PARDONS, *et al.*,
Petitioner,

v.

GEORGE ALLEN, *et al.*,
Respondent.

On Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATEMENT OF THE CASE

This lawsuit was initiated by two Montana prisoners, George Allen and Dale Jacobsen, whose applications for parole were denied by Montana's paroling agency, the Board of Pardons (hereinafter "Board" or "Petitioner"). In denying their applications, the Board failed to cite to *any* of the statutory criteria for parole denial. Instead, the Board issued cursory statements advising plaintiffs, *inter alia*, that they must "discharge their sentence." [Jt. App. at 9a, 11a].

Mr. Allen and Mr. Jacobsen filed this case as a class action on behalf of all present and future inmates of the Montana State Prison who have applied, or who will apply, for parole. The complaint alleges that the Board of Pardons (1) fails to use statutorily-mandated criteria in determining eligibility for parole, and (2) fails adequately to explain the reasons for its denial of parole.

Several weeks after the complaint was filed, the Board *sua sponte* reconsidered the applications of the two named plaintiffs. The Board found that these men were indeed eligible for parole, reversed its decision, and granted parole.[1]

The Board argued in the district court that its decisions, however erroneous they sometimes might be, are beyond review because Montana's parole statute does not create a protected interest in parole. The district court accepted that argument and dismissed plaintiffs' com-

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[1]This case is not moot even though the named plaintiffs are on parole. *See Allen v. Board of Pardons*, 792 F.2d 1404, 1408 n.2 (9th Cir. 1986).

plaint in an unreported decision. The Ninth Circuit reversed. *Allen v. Board of Pardons,* 792 F.2d 1404 (9th Cir. 1986). The Board petitioned for *certiorari* and this Court granted *certiorari* on November 10, 1986.

———o———

SUMMARY OF ARGUMENT

A hundred years ago, the Montana Supreme Court held that the word "shall" is the language of command. The court has consistently applied the rule of statutory construction that the word "shall" connotes a mandatory act, and the Montana Supreme Court reaffirmed this rule as recently as 1982 in a unanimous opinion.

Montana's parole statute decrees in plain language that the Parole Board "shall" release a certain category of prisoner. The statute imposes a standard that the Board must obey. The legislative history of this statute demonstrates that it was the express intention of the Montana legislature to impose restrictions on the Board.

For more than forty years, from 1907 to 1955, Montana had a parole system that vested absolute and unfettered discretion in the Board of Pardons. No statutory restrictions, neither procedural nor substantive, were imposed on the Board. In 1955, Montana drastically altered its parole system. The title of the 1955 Act stated that the Board must operate "within restrictions." The Act imposed numerous standards, both procedural and substantive, on the Board. The Board was not only told when and where to meet, but what to consider in its parole deliberations, what findings to make, and who to parole.

Under Montana rules of statutory construction, the word "shall" connotes a mandatory act, and this Court is bound by the Montana Supreme Court's interpretation of its state statutory language. As a matter of federal law, when a statute is mandatory rather than discretionary in nature—when the state itself imposes limits on its own discretion—a protected liberty interest exists. Therefore, the Montana parole statute, when construed as it must be under state law, creates a protected liberty interest under federal law.

In every case in which this Court has declined to find a state-created liberty interest, the activity in question fell within the agency's unfettered and absolute discretion; no conditions or restrictions were imposed on the exercise of that discretion. This is not such a case. In fact, this case presents one of the strongest examples of "protected interest" characteristics yet considered by the Court. Montana's statute, like the Nebraska statute reviewed in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), "creates a legitimate expectation of parole. . . . [T]he structure of the provision together with the use of the word 'shall' binds the Board of Parole to release" a certain category of prisoner. *Id.* at 9, 11-12. The court below correctly concluded that Montana's parole statute creates a protected liberty interest and, therefore, that under the Fourteenth Amendment, parole cannot be denied without due process of law.

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ARGUMENT

SECTION 46-23-201 CREATES A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST

A. Introduction

Few things are as vital as one's freedom. Few things are as difficult to endure as enforced confinement. To the person imprisoned, parole is associated with life itself. From the day that he or she is sentenced, a prisoner hopes to be paroled as early as authorized by law.

In creating a parole system, the legislature has determined that, for certain prisoners, society's interests are served by their early, supervised release. The presence of such a parole system has an enormous impact on prison life. As Justice Powell has noted:

> Release on parole marks the first time when the severe restrictions imposed on a prisoner's liberty by the prison regimen may be lifted, and his behavior in prison is often molded by his hope and expectation of securing parole at the earliest time permitted by law.

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 19-20 (1979) (Powell, J., concurring and dissenting.)

This Court held in *Greenholtz* that a prisoner does not have a constitutional right to parole *per se;* however, a statute can create a legitimate "expectancy of parole" such that minimum due process procedures must be afforded when parole is denied. *Id.* at 12. In practical effect, each state has two choices when it creates a parole system. A state can create a system in which decisions

regarding parole release—and everything that society and the prisoner have invested in it—are left to the absolute and unbounded discretion of an administrative agency; or it can create a system in which the parole board's decisions must comply with some standard set by the legislature. Montana has chosen the latter. As a consequence, Montana's parole statute creates a liberty interest under the Fourteenth Amendment; prisoners cannot be deprived of that liberty interest without being afforded due process of law.[1]

B. The Plain Language And Legislative History Of Section 46-23-201

The critical language of 46-23-201, M.C.A. (1985), is contained in its first section:[2]

> *46-23-201. Prisoners eligible for parole.* (1) Subject to the following restrictions, the board *shall release on parole* by appropriate order any person confined in the Montana state prison or the women's correction center, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), *when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community* . . . .

---

[1]The question of "what process is due" is not at issue here. "Any discussion of the nature of the process which is due the appellants or whether Montana's present procedures accord that due process is premature." *Allen v. Board of Pardons*, 792 F.2d 1404, 1408 (9th Cir. 1986).

[2]The remainder of 46-23-201, M.C.A. (1985), states in pertinent part as follows:

> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

(emphasis added). The legislative history of 46-23-201, and the plain language of the statute, refute the contention of the Parole Board that the statute does not confer a liberty interest in parole.[3]

Montana initially created an entirely discretionary parole system. Section 9573 of Montana's Revised Code (1907) stated in pertinent part:

> *Parole of prisoners in State Prison.*—The Governor may recommend and the State Board of Prison Commissioners may parole any inmate of the State Prison, under such reasonable conditions and regulations as may be deemed expedient, and adopted by such state board.

Montana retained its entirely discretionary parole system for more than forty years. *See* 12264, R.C.M. (1921) and 94-9818, R.C.M. (1947).

In 1955 Montana drastically amended its parole statute; in fact, Montana completely overhauled its entire parole system. The legislature eliminated the Parole Board's absolute discretion and circumscribed the Board's actions with statutory restrictions. The legislature imposed both procedural and substantive standards. This comprehensive piece of legislation, almost twenty pages in length, specifically identified its purpose—to curb discretion—in its title:

> An Act Creating a Board of Pardons and Prescribing the Appointment and Composition Thereof, With

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[3]Statutory interpretation must begin with an analysis of the plain language of a statute and of its legislative history. *See Blum v. Stenson*, 465 U.S. 886, 893 (1984); *Andrus v. Allard*, 444 U.S. 51 (1979).

> Power and Duty to Grant Paroles, Within Restrictions . . . .

Act of March 3, 1955, 34th Leg., Chap. 153 (L. 1955).

The centerpiece of this new system was Section 12, now codified as 46-23-201, Montana's parole statute. This statute replaced Montana's 1907 parole provision (reproduced above). The most apparent and telling change, consistent with the stated purpose of the Act, is that the "mays" became "shalls."

A statutory change from "may" to "shall" is a significant alteration. In statutory construction, "may" connotes a discretionary act and "shall" a mandatory one unless otherwise indicated by the context in which it is used. As the Montana Supreme Court has stated, "the synonymous terms 'must' and 'shall' . . . [are] generally interpreted as mandatory, and the term 'may' [is] generally construed as permissive or directory only." *State ex rel. McCabe v. District Court*, 106 Mont. 272, 76 P.2d 634, 637 (1938). This rule of statutory construction has been in place in Montana since 1893 and consistently has been enforced.[4] As the Montana Supreme Court recently stated:

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[4]*See, e.g., First National Bank v. Neill*, 13 Mont. 377, 34 P. 180, 182 (1893) (statutory requirement that losing party "shall" pay adversary's costs is mandatory); *State v. Dilworth*, 80 Mont. 102, 258 P. 246, 248 (1927) (statutory requirement that orders of an agency board "shall" be passed by recorded vote is mandatory); *Steinbrenner v. Love*, 113 Mont. 490, 129 P.2d 101, 102-3 (1942) (statutory requirement that treble damages "shall" be awarded is mandatory); *State ex rel. Palmer v. Hart*, 201 Mont. 526, 655 P.2d 965 (1982) (statutory requirement that county clerk "shall" inspect recall petition signatures is mandatory).

> We must construe the statute from the plain meaning of the words used. The language of this statute, using "shall" rather than "may," mandates that the [act be performed].

State ex rel. Palmer v. Hart, 201 Mont. 526, 655 P.2d 965, 968-69 (1982) (unanimous decision per Haswell, Ch. J.) (citations omitted).[5] The Montana legislature is presumed to use language consistent with its common usage. Accordingly, in Montana statutes, the word "shall" creates a binding obligation whenever it is found unless a contrary interpretation is obviously intended. *State ex rel. McCabe, supra,* 76 P.2d at 673; *Steinbrenner v. Love,* 113 Mont. 490, 129 P.2d 101, 102 (1942). Here, then, 46-23-201 must be interpreted as a *mandatory* statute; it mandates that certain agency action be performed.[6]

Even if there were some ambiguity in the plain language of this statute, the presence of the word "shall" would require, under Montana law, that the ambiguity be

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[5]The United States Supreme Court, in interpreting federal statutes, has recognized the same rule of construction: "'shall' . . . is the language of command." *Escoe v. Zerbst,* 295 U.S. 490, 493 (1935). *See also French v. Edwards,* 80 U.S. (13 Wall.) 506, 515 (1871) ("shall" is presumed to be mandatory); *Richbourg Motor Co. v. United States,* 281 U.S. 528, 535-36 (1930) (same).

[6]In matters of state statutory construction, this Court is bound by the interpretation of the state's highest court. *Garner v. Louisiana,* 368 U.S. 157, 166 (1961) ("We are of course bound by a State's interpretation of its own statute . . . ."); *Wainwright v. Goode,* 464 U.S. 78, 84 (1983). The word "shall," as used in 46-23-201, must therefore be given a mandatory construction by this Court. Of course, whether this statute creates a federally protected liberty interest, even with this construction, is a matter of federal law. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

resolved in favor of the plaintiffs. A hundred years ago the Montana Supreme Court adopted the common law rule of statutory construction that requires ambiguous statutes to be interpreted in favor of recognizing a civil right, so as to avoid the risk of sacrificing a right created. In language applicable to the case at hand, the court stated:

> As to whether language should be construed as mandatory or directory, the doctrine is well stated in *Wheeler v. City of Chicago,* 24 Ill. 105, as follows:
>
> > "The word 'may' is construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word 'shall' may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it that construction. But, if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit."

First National Bank of Helena v. Neill, 13 Mont. 377, 34 P. 180, 182 (1893). *Accord: Montana Ore-Purchasing Co. v. Lindsay,* 25 Mont. 24, 63 P. 715, 716 (1901).

Here, a right or benefit—expectancy of parole—*does* depend upon the word "shall" being given an imperative construction. Accordingly, the presumption must be that the word was used in mandatory form. *First National Bank, supra,* 34 P. at 182.

Thus, prior to 1955, the Parole Board could deny parole to anyone at its discretion. Its authority was absolute. The legislature, in the 1907 statute, gave the board the authority to decide parole "under such reasonable con-

ditions and regulations as may be deemed expedient, and adopted by such Board." Sec. 9573 R.C.M. (1907); 94-9818, R.C.M. (1947). In 1955, however, the Board became obligated to parole a particular category of prisoner, and its absolute discretion was eliminated.

Subsections (1) and (2) of the present statute require the Board to make three findings in each parole determination, and to base its parole decision upon them. The Board first must decide whether "in its opinion, there is reasonable probability that a prisoner can be released without detriment to the prisoner or to the community." 46-23-201(1). When a prisoner satisfies this requirement, the Board "shall" release the prisoner unless such release would contravene subsection (2). This clause forbids the Board to release a prisoner unless it is "for the best interests of society . . . [and] only when the Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." When a prisoner satisfies these requirements as well, the Parole Board *must* grant parole. The statute so commands.[7]

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[7]Similarly, those prisoners who do not satisfy all three requirements shall not be paroled; the board's discretion is limited in this respect also. Furthermore, the board is given express instructions regarding its deliberation process; even this is not within its complete discretion. *See* 46-23-202(1):

> Within the 2 months prior to his official parole eligibility date, the board shall consider all pertinent information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, and attitude in prison, and the reports of any physical and mental examinations which have been made.

In short, the board is not only told who to parole and who not to parole, but what to consider in making that determination.

In addition to changing the language of the parole statute, the legislature authorized judicial review of the Board's parole decisions. Prior to 1955, when parole decisions were entirely discretionary, there were no statutory grounds for judicial review. In 1955, when the legislature promulgated a standard for parole, it also created express statutory grounds for judicial review. *See* 46-23-107, M.C.A. Thus, for the first time in its history, the decisions of the Parole Board were placed under judicial scrutiny.[8]

In addition, the legislature instituted numerous procedures in the 1955 statute. The Act stated that the Parole Board "*shall* meet at least twice each month at the state prison"; "[t]he principal office of the Board *shall* be in Deer Lodge"; "[w]ithin the 2 months prior to his official parole eligibility date, the Board *shall* consider all pertinent information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, and attitude in prison. . . ."; "[b]efore ordering the parole of any prisoner the Board *shall* interview him"; "[t]he Board *shall* be required to hear oral statement from all persons desiring to be heard before the Board. . . ." See, respectively, 46-23-104(1) and (2); 46-23-202(1) and (2); and 46-23-204 (emphasis added).

As a result of the 1955 Act, Montana's parole system was no longer without standards. The Parole Board, as the Act's title indicates, was charged with the duty to grant

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[8]The fact that judicial review was established is compelling evidence that the Parole Board was being required to comply with a mandatory standard. If parole decisions were to remain entirely discretionary, judicial review would be unnecessary.

parole "Within Restrictions." The entire parole system acquired a specific form and shape. Certain aspects remained within the complete discretion of the Parole Board, however, and this itself is highly revealing. Through its use of "may" in one statute and "shall" in the next, the Montana legislature carefully determined what aspects of the system to standardize and make mandatory and what aspects to leave completely discretionary. For example, although the Board "shall" consider a prisoner's criminal record and social history [46-23-202(1)], it "may" permit the prisoner to inspect the Board's files. [46-23-108]. Similarly, although the Board "shall" interview a prisoner before ordering his release [46-23-202(2)], the Board "may" appoint any qualified lawyer to represent the Board during its proceedings. [46-23-105]. Likewise, although the Board "shall" order the parole of certain prisoners [46-23-201], once this order is issued, the warden "may" grant the prisoner a 10-day furlough to look for employment and housing. [46-23-215(3)].

In short, the plain language of 46-23-201, its legislative history, and the careful and specifically worded statutory scheme of which it is a part, leave no room for doubt. In 1955, the Montana legislature mandated a parole release standard; it imposed obligations on the Board. By doing so, Montana created a federally protected liberty interest.

C. The Liberty Interest

Section 46-23-201 uses mandatory language, language long recognized in Montana as creating an obligation of performance. The statute imposes restrictions on the Parole Board. Because Section 46-23-201 imposes a binding

standard, it creates a constitutionally protected liberty interest. *See Wright v. Enomoto,* 462 F. Supp. 397 (N.D. Cal. 1976), *aff'd per curiam,* 434 U.S. 1052 (1978):

> Moreover, *Meachum* [*v. Fano,* 427 U.S. 215 (1976)] and *Montanye* [*v. Haymes,* 427 U.S. 236 (1976)] hold that *if the state itself imposes limits on its discretion* by conditioning decisions such as prison transfers on a specific standard being met, *the state creates a liberty interest which is protected by due process.* This is true whether the limits which the state imposes on itself stem from statute, rule, or regulation. *Meachum v. Fano, supra,* 427 U.S. at 226, 96 S.Ct. 2532.

Id., 462 F. Supp. at 402 (emphasis added).

The critical focus, then, is on whether the state has imposed limits on the Parole Board's discretion. The focus is not on whether some discretion still remains. Justice Blackmun has summarized the case law on this point:

> In cases in which we have declined to find a state-created liberty interest, we have noted that state law permitted prison transfers to be made "for whatever reason or for no reason at all," *Meachum v. Fano,* 427 U.S., at 228; that state law "impose[d] no conditions on the discretionary power to transfer," *Montayne v. Haymes,* 427 U.S., at 243; or that state law gave a Board of Pardons "unfettered discretion," [*Connecticut Board of Pardons v.*] *Dumschat,* 452 U.S. [458], 466 [1981].

Hewitt v. Helms, 459 U.S. 460, 479 (1983) (Blackmun, J., concurring and dissenting).

Montana's initial parole statute gave absolute, unfettered discretion to the Parole Board. Montana's current statute stands in stark contrast. The present statute contains a binding standard, a restriction that the Board must

obey. As described in Section B, *supra,* the Board is required to make three findings and, based upon those findings, to grant or to deny parole to prisoners.

Montana's parole statute therefore creates a constitutionally protected liberty interest. Evidence of a binding legislative standard—and, hence, a constitutionally protected liberty interest—is as obvious in Montana's statute as it was in the Nebraska statute reviewed in *Greenholtz.*

Specifically, Nebraska's statute[9] was a "shall . . . unless" statute. Nebraska identified the prisoners who must be paroled by negative implication, that is, the Board was ordered to release an otherwise eligible prisoner "unless it is of the opinion that his release should be deferred because" of one of four enumerated reasons.[10] Subsection

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[9]Neb. Rev. Stat. Sec. 83-1,114(1) (1976) provided:

> Whenever the Board of Parole considers the release of a committed offender, who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) there is substantial risk that he will not conform to the conditions of parole;
>
> (b) his release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) his release would have a substantially adverse effect on institutional discipline; or
>
> (d) his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

[10]In contrast, for example, Oklahoma's parole statute contains no mandates and creates no standards at all, *see Shirley v. Chestnut,* 603 F.2d 805 (10th Cir. 1979), and neither does South Dakota's, *see Peck v. Battey,* 721 F.2d 1157 (8th Cir. 1983) ("The South Dakota statute . . . contains no definitions, no criteria, and no mandated 'shalls.'" *Id.* at 1159).

(2) of the Montana statute performs the same function as the "unless" clause in Nebraska's law. The Ninth Circuit was correct when it noted the functional similarity between the Nebraska and Montana statutes:

> The Montana statute, like the Nebraska statute in *Greenholtz,* uses mandatory language. It states that the Board "shall" release a prisoner on parole when it determines release would not be harmful, unless specified conditions exist which would preclude parole.

Allen v. Board of Pardons, 792 F.2d 1404, 1406 (9th Cir. 1986).

Montana's statute, like Nebraska's, "creates a legitimate expectation of parole. . . . [T]he structure of the provision together with the use of the word 'shall' binds the Board of Parole to release" a certain category of prisoner. *Greenholtz,* at 9, 11-12. *Cf. Hewitt v. Helms,* 459 U.S. 460, 471 (1983).

The present case falls squarely within the line of cases in which a protected liberty interest was found to exist,[11] rather than in the other line of cases.[12] "[Montana] has used language of an unmistakably mandatory character, requiring that [parole] 'shall,' 'will,' or 'must' be [ordered] . . . absent specified substantive predicates." *Hewitt v. Helms,* at 471-72. *See also Greenholtz,* at 11 ("the

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[11]*E.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Enomoto v. Wright,* 434 U.S. 1052 (1978), *aff'g* 462 F. Supp. 397 (N.D. Cal. 1976); *Greenholtz, supra; Vitek v. Jones,* 445 U.S. 480 (1980); *Hewitt v. Helms,* 459 U.S. 460 (1983).

[12]*E.g., Meachum v. Fano,* 427 U.S. 215 (1976); *Montanye v. Haymes,* 427 U.S. 236 (1976); *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458 (1981); *Jago v. Van Curen,* 454 U.S. 14 (1981) (per curiam).

use of the word 'shall' binds the Board . . . .") The state itself has imposed restrictions on the Parole Board's discretion, *see Wright v. Enomoto, supra,* and the Montana parole statute affords prisoners "an objective expectation, firmly fixed in state law." *Vitek v. Jones,* 445 U.S. 480, 489 (1980). In fact, this case presents one of the strongest examples of "protected interest" characteristics yet considered by the Court.

In every case in which the Court has declined to find a protected liberty interest, the applicable statute—in contrast to the one here—imposed no restrictions on agency discretion; agency discretion was unbounded. *See, e.g., Dumschat,* at 466 ("unfettered discretion"); *Montanye v. Haymes,* at 243 ("no conditions on the [agency's] discretionary power"); *Meachum v. Fano,* at 228 (administrative transfer "for whatever reason or for no reason at all"); *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983) ("no substantive limitations . . . completely unfettered.")

There are critical differences between the two lines of cases. These differences are highlighted by a comparison of *Greenholtz* and *Jago v. Van Curen,* 454 U.S. 14 (1981) (*per curiam*), both of which involved parole statutes. In *Greenholtz,* the Court held that a protected interest existed because Nebraska's parole statute created a binding restriction on agency discretion. *Id.* at 11-12. In *Jago v. Van Curen,* Ohio's parole statute failed to create a protected interest because, under it, "the granting of parole was *a purely discretionary matter.*" *Id.* at 21 (emphasis added). Montana's parole statute stands squarely with *Greenholtz* and within the rest of the "protected interest" line of cases.

In light of the case law, the Parole Board is forced here into making two indefensible arguments, one of which was rejected by this Court in *Greenholtz,* and the other, a novel approach, which finds no support in this Court's decisions. First, Petitioner contends that the Montana statute cannot create a protected interest in parole "because of the broad, highly subjective criteria which govern parole decisions . . . [and] which demand largely predictive judgments concerning future conduct." [Brief of Pet. at 10, 11]. This argument entirely misses the point. The question is whether "the state itself [has] impose[d] limits on its discretion," and not whether some discretion still remains. *Enomoto v. Wright, supra,* at 402.

This very argument was explicitly rejected in *Greenholtz.* Parole always involves some exercise of discretion because "[t]he parole-release decision . . . depends on an amalgam of elements, some of which are factual but many of which are purely subjective. . . ." *Greenholtz* at 10. Accordingly, Montana's parole statute, like Nebraska's, "is necessarily subjective in part and predictive in part. Like most parole statutes, it vests very broad discretion in the Board." *Id.* at 13. As the Court recognized in *Greenholtz,* agency discretion is a typical feature of the parole process:

> [T]he state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. It is thus not surprising that there is no prescribed or defined combination of facts which, if shown, would mandate release on parole.

Greenholtz at 8. Thus, as *Greenholtz* makes clear, the existence of some discretion does not, in and of itself, pre-

vent the creation of a protected liberty interest. *See also Hewitt v. Helms* at 472 ("the decision whether to confine an inmate to administrative segregation is largely predictive. . . . But on balance we are persuaded that . . . the State has created a protected liberty interest.")

The Parole Board's second argument is that Montana's statute cannot create a protected interest in parole because it does not employ Nebraska's "shall . . . unless" formula. [Brief of Pet. at 30-32]. This claim finds no support in *Greenholtz* or in any other decision of this Court. *Cf. Anderson v. Winsett*, 449 U.S. 1093, 1095 (1981) (White and Rehnquist, JJ., dissenting from a denial of *certiorari*) ("We did not expressly state in *Greenholtz* that the 'shall . . . unless' language of the Nebraska statute was the critical factor underlying our determination that the statute created a liberty interest.")

The Court did not hold in *Greenholtz* that a certain form of words were required to create a protected liberty interest in parole.[13] Likewise, the Court did not hold in *Wolff v. McDonnell* that specific wording was necessary to create a protected interest in "good time." Nor did the Court hold in *Enomoto v. Wright*, *Vitek v. Jones*, or *Hewitt v. Helms*, that a certain formula was required to create

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[13]The Court held in *Greenholtz* that Nebraska's parole statute created a liberty interest in parole. On this point, the Court was unanimous. Four Justices, writing separately, stated that all parole statutes create such an interest. *See id.* at 19-20 (Powell, J., concurring and dissenting); *id.* at 22-24 (Marshall Brennan, Stevens, JJ., dissenting in part). The majority held, however, that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." *Id.* at 12. Somehow, petitioner interprets this to mean that only a "shall . . . unless" clause can pass muster. There is nothing in *Greenholtz* to support such a myopic view.

a protected interest in remaining in the general prison population.[14]

Linking the existence of a federal liberty interest to a state-created entitlement serves important constitutional purposes. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). There is, however, no discernible policy justification for tying the creation of an interest protected by the Due Process Clause to one arbitrary verbal formula, such as the "shall . . . unless" language of the Nebraska statute.

The Parole Board attempts to seek comfort from *Boothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979), rendered four months after *Greenholtz*, and which predicted that this Court, if faced with the question, would hold that nothing other than a "shall . . . unless" clause can create a protected liberty interest in parole. *Id.* at 664. The *Boothe* court gives no convincing rationale for this prediction, and the vast majority of lower courts that have addressed this question have not agreed with *Boothe*.[15]

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[14]The Supreme Court has never held, or even suggested, that specific words are critical to the formation of a protected liberty interest. In fact, in *Vitek v. Jones*, 445 U.S. 480 (1980), an administrative practice, and not words at all, evidenced such an interest. *Id.*, at 489. Also instructive is *Jago v. Van Curen*, 454 U.S. 14 (1981) (*per curiam*). If the absence of a "shall . . . unless" clause in a parole statute is dispositive, *Jago* could have been decided in a one sentence opinion because the parole statute reviewed in *Jago* did not have one.

[15]Courts which have found a protected interest in parole, despite the absence of a "shall . . . unless" clause, include the court below and *Mayes v. Trammell*, 751 F.2d 175 (6th Cir. 1984); *U.S. ex rel. Scott v. Illinois Parole and Pardons Board*, 669 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1048 (1982);

(Continued on following page)

Instead they have remained faithful to a principle consistently applied by this Court: "if the state itself imposes limits on its discretion, . . . the state creates a liberty interest which is protected by due process. This is true whether the limits which the state imposes on itself stem from statute, rule, or regulation." *Enomoto v. Wright,* at 402. *See Vitek v. Jones,* at 489-90; *Hewitt v. Helms,* at 471-72. In short, those statutes that vest unfettered discretion in the Parole Board do not create a protected liberty interest; those that limit the Parole Board's discretion do.

The Nebraska statute reviewed in *Greenholtz* was termed "unique." *Id.* at 12. It is unique, but not for the reason that Petitioner suggests. Montana's parole statute is unique as well. Indeed, among the states there are 50 unique parole statutes. Because of this, each one must be considered on a "case-by-case basis." *Id.* The Nebraska statute is not unique in being the only statute capable of creating a constitutionally protected liberty interest in parole. *Cf. Anderson v. Winsett, supra.*

"[T]he very institution of parole is still in an experimental stage." *Greenholtz* at 8. Some states may want

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Solomon v. Elsea, 676 F.2d 282 (7th Cir. 1982); *Evans v. Dillahunty,* 662 F.2d 522 (8th Cir. 1981); *Parker v. Corrothers,* 750 F.2d 653 (8th Cir. 1984); *Williams v. Missouri Board of Probation and Parole,* 661 F.2d 697 (8th Cir. 1981); *Bowles v. Tennant,* 613 F.2d 776 (9th Cir. 1980); *Castaldo v. U.S. Parole Commission,* 554 F. Supp. 985 (D. Colo. 1983); *Petrarca v. State of Rhode Island,* 583 F. Supp. 297 (D.R.I. 1984). The majority of courts that have declined to find a protected interest in parole have done so, not due to the absence of a "shall . . . unless" clause, but because the parole board had been vested with unfettered discretion. *See e.g.,* cases cited in n.10 *supra.*

parole—and everything that it means to society and to the prisoner—to be left to the standardless and unfettered discretion of an administrative agency. Other states may decide, as Montana did, to place its Parole Board "Within Restrictions." Act of March 3, 1955, 34th Leg., Chap. 153 (L. 1955).

Thus, two points are clear. First, Montana can choose the parole system it wants. Second, "if [Montana] itself imposes limits on [agency] discretion, . . . the state creates a liberty interest which is protected by due process." *Enomoto v. Wright,* at 402. Montana has done just that.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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No. 86-461

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOARD OF PARDONS;
HENRY BURGESS, Chairman,

Petitioners,

v.

GEORGE ALLEN and DALE JACOBSEN,
on their own behalf and on behalf of
all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY ARGUMENT

I. THE RESPONDENTS' CLAIM THAT ANY RESTRICTION ON OFFICIAL DISCRETION UNDER STATE LAW CREATES A PROTECTED LIBERTY INTEREST IS UNSUPPORTED DECISIONALLY AND IGNORES THE CRITICAL ISSUE OF WHETHER MONT. CODE ANN. § 46-23-201 CREATES A REASONABLE EXPECTATION OF PAROLE RELEASE.

A. Introduction.

As developed in the petitioners' principal brief, a liberty interest protected by the due process clause of the Fourteenth Amendment arises under a state parole statute only if it creates a reasonable expectation of release upon satisfying those minimum conditions precedent to eligibility for parole-release consideration. The Nebraska parole law applied in *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 12 (1979), gave rise to such an interest because it established a presumptive entitlement to parole release "unless any one of ... four specifically designated reasons [for denial] are found." *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466-67 (1980) ("[w]hen Nebraska statutes directed that inmates who are eligible for parole 'shall' be released 'unless' a certain finding has been made, the statutes created a right"). The Court cautioned, however, that the Nebraska statute had a "unique structure and language," 442 U.S. at

12, and clearly anticipated that determination of whether a protected liberty interest arose under other state laws would be resolved with reference to a single criterion: Does the involved statute establish a reasonable expectation of parole release?

The respondents conspicuously fail to address either the presumptive nature of the Nebraska statute or the controlling issue of whether Mont. Code Ann. § 46-23-201 (1985) creates a reasonable expectation of parole release. They instead suggest that a protected liberty interest arises under a parole-release statute whenever a "parole board's decisions must comply with some standard set by the legislature." (Brief for Respondent [*sic*] at 5.) The respondents later state that "[t]he critical focus ... is on whether the state has imposed limits on the Parole Board's [*sic*] discretion" and that, because section 46-23-201 "contains a binding standard, a restriction that the Board must obey[,]" it "creates a constitutionally protected liberty interest." (*Id.* at 13-14.) Their position is patently inconsistent with the Court's prior decisions addressing the

scope and nature of prisoner entitlements under the due process clause.[1]

B. Relationship Between Liberty-Interest Entitlement and Degree of Official Discretion.

Before a protected liberty interest under state law can arise in prisoner-rights cases, an entitlement to the particular status sought must exist. Presently that status is parole release, and the respondents accordingly must establish a statutory right thereto. Nonetheless, they do not contend that an entitlement to release arises under section 46-23-201 upon satisfying minimum parole-release consideration requirements; instead, they essentially claim that, because the statute mandates parole when the petitioner Board concludes

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[1]The *amici curiae* supporting the respondents' position argue similarly. Brief Amicus Curiae of the Yale Law School Legal Services Organization Prison Law Project and of the University of Southern California Law Center Post-Conviction Justice Project at 5-6 ("[t]his case ... involves a state legislative scheme that restricts the discretion of the paroling authority and also has a mandatory character--parole 'shall' be granted when certain criteria are met"); Brief Amicus Curiae of Eugene Newbury at 4-5 (espousing a "mandatory/substantive rule" under which a protected liberty interest arises if parole-release decisions must be predicated on legislatively-prescribed "substantive standards"). *Amicus curiae* Newbury further suggests that the Court repudiate *Greenholtz* and hold that a protected liberty interest is created whenever a state establishes a parole system. (Amicus Curiae Newbury Brief at 24-26.) The parties, however, have not urged abandonment of *Greenholtz* but have rather contended that it is consonant with their respective positions. *Amicus curiae* Newbury's suggested reassessment of *Greenholtz* should therefore not be considered. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979).

the three broad policy standards in the statute are satisfied, a protected entitlement for due process clause purposes exists from the inception of the parole application process.[2] Their argument is, quite obviously, little more than a refinement of the notion--rejected in *Greenholtz*--that the mere possibility of parole release constitutes a protected entitlement and ignores the fundamental inquiry in this case. *See Jago v. Van Curen*, 454 U.S. 14, 17-18 (1981) (*per curiam*); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 465; *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The existence of very general and predictive release criteria which govern the petitioner Board's determinations clearly cannot be deemed, from an objective perspective, to create a reasonable expectation of parole. *See Parker v. Corrothers*, 750 U.S. 653, 657 (8th Cir. 1984); *Williams v. Briscoe*, 641 F.2d 274, 276-77 (5th Cir.), *cert. denied*, 454 U.S. 1048 (1981). As discussed in the petitioners' principal brief, the criteria under section 46-23-201 grant the Board almost unlimited discretion in parole-release matters. (Brief for Petitioners at 34-35.) Indeed, the Court of Appeals below recognized that the statute "vests great discretion in

[2]Contrary to the respondents' assertion, section 46-23-201 does not require the petitioner Board to make affirmative findings as a condition to parole-release denial. (Brief for Respondent at 10, 14.) The statute only specifies those criteria which must be satisfied prior to release. The Board does, as a matter of administrative practice, notify applicants of the basis for parole denial, but such notice need not relate the reason for the denial to one or more of the statutory standards. Mont. Admin. R. § 20.25.502.

the Board" which "must make difficult and highly subjective decisions about risks of releasing inmates." (J.A. 23a.) The respondents' contention that the parole criteria in section 46-23-201, when coupled with a requirement that a prisoner be released when they are deemed satisfied, establish an interest protected under the due process clause accordingly obscures the relationship between the breadth of the Board's decisionmaking discretion and the existence of any reasonable expectation by an inmate that his parole-release application will be favorably acted upon. Thus, while a prisoner may entertain a unilateral expectation that he meets those criteria, they are far too general to warrant implication of a liberty interest. *Cf. Jago v. Van Curen*, 454 U.S. at 18 ("the administrators of our penal systems need considerable latitude in operating those systems, and ... the protected interests of prisoners are necessarily limited"). The respondents' failure even to suggest that a reasonable expectation of parole release exists under section 46-23-201 is, therefore, not inadvertent.

The respondents' selective quotations from various decisions[3] for the proposition that any "substantive" limitation on official discretion gives rise to a protected

[3]*Olim v. Wakinekona*, 461 U.S. 238 (1983); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Connecticut Board of Pardons v. Dumschat*, *supra*; *Vitek v. Jones*, 445 U.S. 480 (1980); *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *aff'd mem.*; 434 U.S. 1052 (1978); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976).

liberty interest simply distort the involved holdings. (Brief for Respondent at 15-16.) As stated above, that a state agency or official is vested with "unfettered discretion" with respect to a particular penal system determination has significance for due process clause purposes because it directly relates to the reasonableness of an inmate's expectation that he will maintain or be awarded a particular status. In *Wright v. Enomoto, supra,* for example, the Court summarily affirmed a three-judge district court opinion that, under California prison regulations, inmates reasonably expected that, prior to being confined to maximum security segregation, penal officials were required to conclude that the prisoners "are a menace to themselves and others or a threat to the security of the institution." 462 F. Supp. at 403. *Wright* represents that class of prisoner cases in which an existing status was held defeasible only upon a finding of cause and must therefore be carefully distinguished from decisions--such as parole release--which ordinarily do not involve loss of a presumed right to a given status; i.e., when prison officials' discretion to modify a status is conditioned upon a determination that certain criteria exist, the inmate is presumptively entitled to that status until the mandated finding is made. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539, 557 (1974) ("the State having created the right to good time and itself recognizing that its *deprivation* is a *sanction* authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth

Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated") (emphasis supplied).[4] Where no such presumptive entitlement exists, however, the mere fact that a decisionmaker's discretion is legislatively focused on various broad policy standards does not create a reasonable expectation that a particular status will be continued or granted. In sum, the analytical touchstone in the Court's prisoner-entitlement cases has not been, as the respondents argue, the existence *vel non* of "unfettered discretion"; the Court has rather examined carefully the

[4]Federal courts of appeals applying *Wright*, including the Ninth Circuit, have fully appreciated that its holding as to the existence of a state-law predicated liberty interest derived from a presumed entitlement to continuation of a particular status subject to loss only upon specific factual findings. *E.g., Green v. McKaskle,* 788 F.2d 1116, 1125 (5th Cir. 1986); *Roberts v. Spalding*, 783 F.2d 867, 871 (9th Cir.), *cert. denied*, 107 S. Ct. 399 (1986); *Bills v. Henderson*, 631 F. 2d 1287, 1293 (6th Cir. 1980).

relevant statutory or regulatory provisions to determine if they establish a presumptive right to a given status.[5]

II. THE RESPONDENTS' DISCUSSION OF THE "LEGISLATIVE" HISTORY ASSOCIATED WITH ENACTMENT OF THE PREDECESSOR PROVISION TO MONT. CODE ANN. § 46-23-201 ADDS NOTHING TO THEIR ANALYSIS.

The respondents' lengthy discussion of the adoption in 1955 of Rev. Code Mont. § 94-9832 (Repl. Vol. 1969) is both curious and irrelevant. (Brief for Respondent at 5-10.) That the Montana legislature determined to establish general criteria for the granting of parole release is implicit in the current statute, but those standards do not, in themselves, create a protected liberty interest. Further, as stated in the petitioners' principal brief and pointedly ignored by the respondents, the Montana Supreme Court has consistently construed parole under section 46-23-201 and its prior

[5]The respondents' claim that, under the petitioners' analysis, "only a 'shall ... unless' clause can pass muster" mischaracterizes the latter's position. (Brief for Respondent at 18-19.) As stated in the petitioners' principal brief at 32 n.11, a reasonable expectation of parole release can arise outside the context of a presumptive-entitlement statute only if the decisionmaker's discretion is limited to resolving simple factual questions capable of ready and definitive determination. No such statute now exists in any American jurisdiction. The structure of a presumptive-entitlement statute is, of course, not restricted to a "shall ... unless" formulation although it has been adopted in the Model Penal Code and under Nebraska law.

codifications to be a matter of administrative grace rather than statutory right. (Brief for Petitioners at 33-34.) These decisions, which constitute an authoritative interpretation of section 46-23-201, and the otherwise unquestionably expansive scope of the petitioner Board's discretion in resolving parole applications negative any claim that the legislature intended a presumptive right to release to arise upon a prisoner's satisfying the minimum conditions for parole-release consideration. Lastly, the presence of various procedural requirements in sections 46-23-104, 46-23-201, and 46-23-204 is, as the Court has specifically held,[6] immaterial to whether a protected liberty interest exists. (Brief for Respondent at 11.)

[6]*Olim v. Wakinekona*, 461 U.S. at 250-51; *Hewitt v. Helms*, 459 U.S. at 471.

CONCLUSION

The petitioners respectfully request that the judgment of the Court of Appeals be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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No. 86-461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

**BOARD OF PARDONS,
HENRY BURGESS, CHAIRMAN,**

Petitioners,

vs.

**GEORGE ALLEN and DALE JACOBSEN,
on their own behalf and on behalf of all other persons similarly situated,**

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE YALE LAW SCHOOL LEGAL SERVICES ORGANIZATION PRISON LAW PROJECT AND OF THE UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER POST-CONVICTION JUSTICE PROJECT

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QUESTION PRESENTED

Does the Montana parole statute create a liberty interest in parole release protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

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INTEREST OF THE AMICI CURIAE[1]

The Yale Legal Services Prison Law Project was founded in 1970 in order to provide legal assistance to indigent inmates at the Federal Correctional Institution at Danbury, Connecticut. The Post-Conviction Justice Project of the University of Southern California Law Center was founded in 1980 to provide legal assistance to indigent inmates at the Federal Correctional Institution at Terminal Island, California.

In both organizations, law students under faculty supervision provide a full range of post-conviction services. A

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[1] Letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court. Supreme Court Rule 36.2.

major portion of the work of both organizations consists of representing inmates at parole hearings, and preparing administrative appeals of denials of parole. During the last seventeen years, students involved in the Projects have represented inmates in hundreds of parole hearings.

Both organizations have an interest in making the parole process fair and equitable. Representatives of each organization have testified before Congressional committees regarding proposed parole and sentencing laws, and have appeared as guest lecturers at the regular quarterly executive sessions of the United States Parole Commission. Members of both projects have written comments on proposed changes to the federal parole system, have litigated

cases raising questions concerning that system, and have written articles about the function of parole and the process by which federal parole decisions are made. See, e.g., Curtis, Federal Judicial Power, Parole Guidelines, and Sentence Reform, II Prisoners' Rights Sourcebook (I. Robbins ed. 1980); O'Donnell, Churgin and Curtis, Towards a Just and Effective Sentencing System (1977); Parole Release Decisionmaking and the Sentencing Process, 8 Yale L.J. 810 (1975).

SUMMARY OF ARGUMENT

In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), this Court ruled that when a legislature writes a statute which provides for parole, which limits the discretion of paroling authorities, and which mandates release if statutory criteria are met, such a statute creates a liberty interest entitled to constitutional protection. This case presents the occasion for this Court to clarify and to reaffirm its holding.

Montana's parole statute, at issue here, mandates parole release when the Montana Board of Pardons (Board) makes three findings:

(1) There is reasonable probability that the prisoner can be

released without detriment to the prisoner or the community;

(2) Parole is in the best interest of society; and

(3) The prisoner is able and willing to fulfill the obligations of a law-abiding citizen. Montana Code Ann. § 46-23-201.

Because the statute mandates release when the requisite findings are made, the Court of Appeals for the Ninth Circuit held that, under Greenholtz, the Montana statute created a protected liberty interest in parole. Allen v. Board of Pardons, 792 F.2d 1404, 106-08 (9th Cir. 1985). This case, like Greenholtz, involves a state legislative scheme that restricts the discretion of the paroling authority and also has a mandatory character -- parole "shall" be

granted when certain criteria are met. Thus, under Greenholtz (and under the general framework that the Court has developed in the due process area), the Montana parole legislation is an example of a statute which creates a constitutionally-protected liberty interest.

The State, seeking to avoid the reach of this Court's due process rulings, makes two arguments. First, the State notes, correctly, that under the Montana statute, the Board retains some discretion. Of necessity, parole involves a "predictive judgment about what is best both for the individual inmate and for the community." Greenholtz, supra, 442 U.S. at 8. But at the same time, prisoners "justifiably expect that parole will be granted

fairly and according to law whenever [general statutory standards of eligibility] are met." Id. at 19 (Powell, J., concurring). The existence of discretion in a decisionmaking process does not render a statutory scheme totally standardless nor does it give decisionmakers unlimited authority.

Second, the State of Montana advances the novel argument that magic words are required for a statute to create a liberty interest -- that the statute must say "shall . . . unless" for a protected liberty interest to arise (Brief of Appellant, pp. 30-31). Greenholtz does not stand for that proposition, nor should it be read to require a specific form of words to create a liberty interest. Greenholtz, fairly read in conjunction with the

Court's due process jurisprudence, requires that for a protected liberty interest to exist, the legislature must limit the discretion of parole authorities and make parole mandatory upon satisfaction of enumerated criteria. Montana's statute meets that test.

This Court's due process jurisprudence stands for an important principle -- that when legislatures create particular rights through statutory enactments, these rights are enforced. This principle has special significance in the prison setting, where inmates are dependent upon and controlled by the state. A state's obedience to its own laws is critical to instruct its prisoners about the values

of participating in an ordered, law-abiding system.

ARGUMENT

I. STATUTES CAN CREATE PROTECTED INTERESTS.

Beginning with Goldberg v. Kelly, 397 U.S. 254 (1970), this Court has recognized that statutory schemes can create liberty or property interests that cannot, under the Fifth and Fourteenth Amendments, be taken away without due process of law. A first question in every "due process" case is whether a protected interest exists. Over the last seventeen years, this Court has developed a consistent approach to the question.

First, there are some kinds of interests which the Court recognizes even without the existence of express

legislative statements. See, Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) (parent's right to maintain a legal relationship with one's children). Second, in areas involving property rights, the Court has looked to the language of statutes to determine whether the legislature has given the claimant a right to receive a particular benefit. See, Mathews v. Eldridge, 424 U.S. 319 (1976) (right to disability under federal law); Bell v. Burson, 402 U.S. 535 (1971) (due process required for suspension of driver's license); cf. Leis v. Flynt, 439 U.S. 438 (1979) (no protected property or liberty interest of lawyer to be admitted pro hac vice). Third, in areas in which an initial deprivation of liberty has already been sanctioned, the Court has

looked to statutory schemes to determine whether prisoners retain residual liberty interests. Greenholtz, supra; Hewitt v. Helms, 459 U.S. 460 (1983) (due process required for placement of prisoner in disciplinary segregation); Vitek v. Jones, 445 U.S. 480 (1980) (due process required for transfer from state prison to mental hospital). In cases where the Court finds a protected liberty or property interest, the quantum of what process is due is a question of federal constitutional law, and is not dependent upon the procedural remedies set forth in a state statute. Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S. Ct. 1487 (1985).

This case falls within the third category: prisoners in Montana claim

that, under Montana's parole statutes, they have a right to release if certain statutory criteria are met. To determine the Montana prisoners' claim, it is necessary to review this Court's holdings and to analyze the Montana parole statute.

II. WHENEVER A STATUTORY SCHEME LIMITS THE DISCRETION OF THE PAROLE AGENCY, PROTECTED LIBERTY INTERESTS EXIST.

In Greenholtz, the Court applied an analysis that it has used consistently in deciding cases concerning the due process rights of inmates. The question is whether "the state itself imposes limits on its discretion," Enomoto v. Wright, 434 U.S. 1052 (1978), summarily

aff'g, 462 F. Supp. 397 (N.D.Cal. 1976). Such limits on discretion may be imposed by statute or by regulation. Hewitt v. Helms, supra; Vitek v. Jones, 445 U.S. 480, 488-489 (1980).

As the Court noted in Greenholtz, states have no duty to establish parole systems, and if a state does create such a system, it "may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority." 442 U.S. at 8. If a state sets no standards, and says in essence only that parole may be granted whenever the paroling agency decides to do so, then no protected interests exist. However, there is a difference between broad standards and no standards at all. The presence of general release criteria

does not mean that a paroling authority's discretion is unlimited. Indeed, in Greenholtz, the factors to be considered by the Nebraska Board of Parole were broad in scope. The Nebraska statute required that the Parole Board make four general predictive findings. The Court recognized that the parole release decision "depends upon an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience wi' ' the difficult and sensitive task of evaluating the advisability of parole release," 442 U.S. at 10. Nevertheless, the Court held that the statute created an "expectancy of release." Id. at 12.

The basis for the Greenholtz

holding was that the statute limited the discretion of the Board -- both by the use of the mandatory word "shall" and by the enumeration of the specifically designated reasons for deferral of release. These limitations, in turn, created a justified expectation of release on the part of inmates, despite the obvious fact that such expectation amounted to much less than a guarantee of release in any particular case. One message of Greenholtz is that substantial discretion can exist within the framework of a statutorily-created liberty interest protected by due process requirements.

III. MONTANA'S STATUTE LIMITS THE BOARD'S AREA OF DISCRETION AND THEREFORE CREATES A PROTECTED INTEREST.

The Montana statute, like the Nebraska statute in Greenholtz, requires the granting of parole after the Montana Board makes certain predictive findings favorable to the inmate. The two statutes cannot be distinguished from each other in any meaningful way. The Montana statute, like the Nebraska statute, creates a liberty interest entitled to due process protection.

A. The Legislative History of Montana's Parole System.

In 1955, Montana replaced a totally

discretionary parole system with the current statute that limits the Board's discretion. The earlier statute, passed in 1907, read as follows:

> Parole of prisoners in State Prison. -- The Governor may recommend and the State Board of Prison Commissioners may parole any inmate of the State Prison, under such reasonable conditions and regulations as may be deemed expedient, and adopted by such state board.

Montana Revised Code, Section 9573 (1907).

The 1955 Act specified its purpose in its title:

> An Act Creating a Board of Pardons and Prescribing the Appointment and Composition Thereof, With Power and Duty to Grant Paroles, Within Restrictions. . . .

Act of March 3, 1955, 34th Leg., Chap. 153 (L. 1955) (emphasis added).

The 1907 statute was not mandatory nor did it restrict the discretion of the paroling authority in any way. However, the 1955 statute, in effect today, shifted the parole decision-making process from "may" to "shall," from unlimited discretion to "within restrictions." Under Montana law, the shift was significant. Inclusion of the word "shall" and of the enumerated criteria for parole release transformed a formerly standardless parole process into one of limited discretion with a mandatory release component.

B. Analysis of the Statute.

The Montana statute is very similar to the Nebraska statute analyzed in Greenholtz. Under the Nebraska statute,

"Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

"(a) There is a substantial risk that [the inmate] will not conform to the conditions of parole;

"(b) His release would depreciate the seriousness of the crime or promote disrespect for law;

"(c) His release would have a substantially adverse affect on institutional discipline; or

"(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date."

Neb. Rev. Stat. § 83-1, 114 (1) (1976), quoted at 442 U.S. 11.

Montana's statute embodies a direction to the Parole Board to release an eligible prisoner upon favorable findings concerning three specific criteria. The Montana statute, in

relevant portion, reads as follows:

Prisoners eligible for parole.

(1) Subject to the following restrictions, the board shall release on parole . . . any person confined in the Montana state prison . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community. . . .

(2) A parole shall be ordered only for the best interest of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes tnat he is able and willing to fulfill the obligations of a law-abiding citizen.

Mont. Code Ann. § 46-23-201.

The parole decisionmaking process is functionally the same in Montana as in the Nebraska statute quoted in Greenholtz. Both statutes require the paroling authorities to ask similar questions, and to make similar

findings. Both statutes provide that parole "shall" be granted when the prescribed findings made are favorable to the inmate. The same mandatory language appears in both statutes: In the Nebraska statute, "Whenever the Board of Parole considers the release of a committed offender . . . it shall order his release unless. . . ."; in Montana, "Subject to the following restrictions, the board shall release on parole. . . ." In short, under both statutes, parole is presumptive upon findings favorable to inmates.

Moreover, the criteria for parole are similar under the two statutes. Each statute looks to the capacity of the potential parolee to conform his or her actions to the requirements of law. The Nebraska statute asks whether

"[t]here is a substantial risk that he will not conform to the conditions of parole," and whether "[h]is continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." Montana asks whether "there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community," and whether the prospective parolee is "able and willing to fulfill the obligations of a law-abiding citizen."

Each statute also considers the effect of parole upon society. The Nebraska statute asks whether "[h]is release would depreciate the seriousness of his crime or promote disrespect for

law." Montana requires that "parole shall be ordered only in the best interest of society." In sum, it is futile to parse the words of the statutes in an attempt to differentiate them. When the statutes require the paroling authorities to consider certain criteria (as do the Nebraska and Montana statutes), there is no real difference between a statute which mandates parole "unless" certain findings are made, and a statute which provides that parole shall be granted "if" or "when" such findings are made. The mandatory nature of each statute, and the similarity of criteria employed for grant of parole, require that the statutes be treated similarly for purposes of due process analysis.

In addition to the language of the

statute, the State court's rules of statutory interpretation leave no room for doubt that Montana's statute is mandatory. Montana courts have made it plain that when the word "shall" appears in a statute, that word connotes a mandatory directive. The Supreme Court of Montana has recently reaffirmed this interpretation:

> We must construe the statute from the plain meaning of the words used. The language of this statute, using "shall" rather than "may," mandates that the [county clerk perform the required act].

State ex rel. Palmer v. Hart, 201 Mont. 526, 655 P.2d 965, 968-69 (1982) (citations omitted). This Court is bound by the construction of the Montana Supreme Court. Brown v. Ohio, 432 U.S. 161 (1977). This Court must recognize that the Montana legislature has used

language of "unmistakably mandatory character." Hewitt v. Helms, supra, 459 U.S. at 471.

IV. DUE PROCESS IS IMPORTANT FOR FAIR IMPLEMENTATION OF MONTANA'S PAROLE STATUTE.

In jurisdictions where parole exists, nothing is more important to a prisoner than doing everything in his or her power to obtain parole. Inmates look to statutes, to regulations, to rules and to practices in their efforts to know what they must accomplish to demonstrate to the paroling authority that they are worthy of parole. Uncertainty about the nature of the paroling process can be devastating -- not only to prisoners' morale but to

their conception of justice. See Davis, Discretionary Justice, 126-133 (1969). Governments, having invoked the punishment of incarceration, also have the responsibility of setting a moral example to those who have been guilty of transgressions of their laws. This role of moral preceptor includes being fair and equitable to those it imprisons. One basic requirement of fairness lies in equitable enforcement of whatever rules are set up to guide the discretion of those who administer the paroling process. And when the procedures promulgated by state authorities are couched in "language of an unmistakably mandatory character," and require "specific substantive predicates," the state has created a protected liberty interest. Hewitt v. Helms, supra, 459

U.S. at 471-72.

Prisoners, like everyone else, understand that any paroling process is predictive, and therefore that judgment and discretion are necessary components of such a process. Even the federal system, which embodies comprehensive guidelines (28 C.F.R. §§ 2.1-2.63) intended to structure and regularize the paroling process, and to minimize the effects of uncertainty, has not abolished discretion. Yet discretion, even broad discretion, can be reconciled with fairness of implementation as required by due process.

In the prison context, where the lives of inmates are regulated and controlled to an exquisite degree, and where inmates are totally dependent upon their keepers, fairness is especially

important. When a statute limits the discretion of paroling authorities and gives specific instructions about the process by which parole decisions must be made, as does the Montana statute, that statute creates rights which must be protected. Prisoners must be able to look to the words of the statute and to understand that they are truly being treated in accordance with its terms. Just as we expect all members of our society to follow rules, so it is fair for prisoners to be entitled to expect that their custodians will also follow the rules.

V. CONCLUSION

When parole is adopted as an alternative to a "fixed" sentencing

scheme, parole becomes an integral and important part of a state's sentencing structure. States that adopt systems of parole should administer these systems fairly, in accordance with the rules and subject to the restrictions which they themselves promulgate. Amici, respectfully, regretted the Court's refusal in Greenholtz to find a liberty interest inherent in the decision of a state to create a parole system. But, while Greenholtz did not go far enough, it established important and meaningful parameters. Greenholtz recognized that states may wisely choose not to allow total discretion by paroling authorities in dispensing liberty, for to do so would invite abuses, unwarranted disparities, and a perception of unfairness.

While this Court has given the states discretion in deciding the kind of parole system to fashion, this Court has also understood the risks of unfettered discretion. As a consequence, statutes should be read to implement legislative intent to limit discretion whenever evidence of that intent appears in the statute or in its legislative history. No magic formula, no single set of words, should be required to recognize that contemporary legislatures often seek to avoid unfair parole practices. Many legislatures have come to understand that to set up a parole system without limits upon discretion is a mistake. Many states appreciate the harms that can flow from removing all legitimate expectation of parole. Many states have wished to

avoid the unfairness and sense of injustice that arises when inmates can never know what they should do to obtain parole, and can never know why parole is granted or denied. As a consequence, many states have limited the discretion of parole authorities. Given the harms of unfettered discretion, a state should bear a heavy burden in showing that its intent was to create a standardless process.

Montana's statute exhibits no such intention. Montana's statute limits the discretion of the state's paroling authority. The statute mandates release upon findings favorable to the inmate on three designated criteria. The statute thus creates a liberty interest protected by the Due Process Clause of

the Fourteenth Amendment to the Constitution.

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v.

GEORGE ALLEN and DALE JACOBSEN,
on their own behalf and on behalf of
all other persons similarly situated,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

AMICUS CURIAE BRIEF OF EUGENE NEWBURY IN SUPPORT OF THE RESPONDENTS

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No. 86-461

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BOARD OF PARDONS;
HENRY BURGESS, Chairman,

Petitioners,

vs.

GEORGE ALLEN and DALE JACOBSEN,

Respondents.

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With the written consent of Petitioners and Respondents, copies of which are attached as Exhibits A and B to this brief, Eugene Newbury submits this brief as Amicus Curiae in support of Respondents George Allen and Dale Jacobsen.

INTEREST OF AMICUS CURIAE

Amicus curiae is a prisoner confined by the Illinois Department of Corrections in their Danville Correctional Center facility. He files this brief in support of the position of Respondents George Allen and Dale Jacobsen.

Amicus curiae is eligible for parole pursuant to Ill. Rev. Stat., ch. 38, § 1003-3-5 (1985), and is entitled to and has received annual hearings to determine whether he meets the substantive standard for parole set forth in that statute and in the Rules of the Illinois Prisoner Review Board. In United States ex rel. Scott v. Illinois Parole and Pardon Board, 669 F.2d 1185 (7th Cir.), cert. denied, 459 U.S. 1048 (1982), the United States Court of Appeals for the Seventh Circuit applied this Court's decision in Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979), in determining that the Illinois statutes and rules

governing parole created a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment. See also, Walker v. Prisoner Review Board, 694 F.2d 499 (7th Cir. 1982); Newbury v. Prisoner Review Board, 791 F.2d 81 (7th Cir. 1986).

Although both Petitioners and Respondents have stated that the Seventh Circuit's decision in Scott is consistent with this Court's decision in Greenholtz and was correct (Petition for Certiorari at 19; Brief for Petitioners at 31; Brief in Opposition to Certiorari at 15), Petitioners have advanced several arguments which, if accepted by this Court, might lead to a reversal of Greenholtz and Scott and to a finding that Illinois law governing parolees does not create a protected liberty interest. Amicus curiae believes that the additional procedures required by the Due Process Clause are

likely to result in more accurate decision-making and, ultimately, to his release on parole. He, therefore, files this brief in support of the position of Respondents and to defend this Court's decision in Greenholtz that, whenever the state uses mandatory language coupled with a substantive standard to define a liberty or property interest, that interest is entitled to due process protection. Alternatively, he argues that this Court should adopt a rule that whenever a state creates a parole system, a prisoner's right to parole is protected by due process.

SUMMARY OF ARGUMENT

In Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979), this Court narrowly decided that Nebraska's decision to provide parole for persons sentenced to its prisons did not in itself create a liberty interest protected by the Due Process Clause. However, the Court found that the state's use of mandatory language, coupled with a substantive standard for determining when parole should be granted, did create such a liberty interest. Indeed, this Court was unanimous in its opinion that persons eligible for parole consideration in Nebraska had a liberty interest protected by the Due Process Clause. Since Greenholtz was decided, this Court has repeatedly used the same "mandatory/substantive" test to determine whether a state has, through its statutes or rules, created a liberty or property interest protected by due process. In the present case the United State Court of

Appeals for the Ninth Circuit applied this test to Montana's parole statute and determined that it too created a liberty interest protected by the Due Process Clause. Allen v. Board of Pardons, 792 F.2d 1404 (1986). In seeking to overturn this result, Petitioners ask this court to adopt a rule which would have lead to a different result in Greenholtz and which would substantially modify the holding in Greenholtz. They argue that there is a special rule for determining whether a parole statute creates a liberty interest that is different from the mandatory/substantive test used by this Court in Greenholtz and in every other context. Petitioners ask this Court to hold that a parole statute creates a protected liberty interest only when it uses the precise language of Nebraska's statute. Petitioners' Brief at 10-11. Amicus curiae will argue that there is no reason for using a more restrictive standard for deter-

mining whether a state has created a protected liberty interest in parole than for determining whether it has created any other liberty or property interest. Rather, amicus curiae will argue that this Court should only modify Greenholtz, if at all, by finding that whenever a state creates a parole system, such a system is protected by due process. This rule is justified because parole is in essence part of the sentencing process and this Court has held that due process is required in sentencing.

Petitioners also argue that this Court should apply a new, more restrictive test for determining whether a parole statute creates a protected liberty interest. Specifically, they argue that Montana's statute does not create a liberty interest because the standard for parole in this statute is, in part, subjective and because that standard contains elements which are predictive rather than based upon historical fact. Petitioners' Brief at 11.

However, since this Court in Greenholtz found that Nebraska's statute created a protected liberty interest despite the fact that the Court had explicitly determined that it was both subjective and predictive, Petitioners are effectively asking this Court to overturn or substantially modify Greenholtz. Amicus curiae will argue that no such modification is justified.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT MONTANA'S PAROLE STATUTE CREATES A PROTECTED LIBERTY INTEREST BECAUSE IT CONTAINS MANDATORY LANGUAGE AND A SUBSTANTIVE STANDARD.

A statute creates a liberty or property interest protected by the Due Process Clause of the 14th Amendment when it contains mandatory language and a substantive standard. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979). Chief Justice Rehnquist most clearly articulated this rule writing for the Court in Hewitt v. Helms, 459 U.S. 460,

472, (1983): "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." The Supreme Court has repeatedly applied this "mandatory/substantive" rule in cases involving state-created liberty and property interests. Petitioners would have this Court overturn the decision in Greenholtz and its progeny and force the Court to create a separate rule in the case of parole. Petitioners want a rule which would require a state's parole statute to be a carbon copy of the "shall ... unless" language in Greenholtz. Petitioners also argue that only a statute which provides standards for decision that are entirely objective and historical would create a protected entitlement. For the reasons which follow, the Court should reject Petitioners' arguments and uphold the Ninth Circuit's decision below.

A. The Supreme Court has Consistently Found a State-Created Liberty or Property Interest When the Statute Satisfies the Mandatory/Substantive Test.

This Court has held that a statute creates a protected liberty interest if it contains mandatory language and a substantive standard. For example, in Greenholtz the Court accepted the prisoners' position that "the structure of the provision together with the use of the word 'shall' binds the Board of Parole to release an inmate ... absent the requisite finding that one of the justifications for deferral exists." 442 U.S. at 11-12. The prisoner was therefore entitled to minimum procedural due process; in Greenholtz this consisted of a parole hearing and a statement of the reasons for denial.

The Court has consistently applied the mandatory/substantive test to determine whether a state has created a liberty or property interest. For example, in Hewitt

v. Helms, the Court held that Pennsylvania's administrative segregation statute created a protected liberty interest in remaining in the general prison population. The statute contained repeated use of "unmistakably mandatory" language --use of 'shall,' 'must,' 'will,' -- and "specified substantive predicates" -- "the need for control," and "the threat of serious disturbance." 459 U.S. at 471-472. The Court emphasized that it relied on the mandatory language and the substantive standards in holding that the inmate had a protected interest in not being segregated unless the standards were met. Id. at 471.*

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* See also Ford v. Wainwright, 106 S.Ct. 2595 (1986), decided on 8th Amendment grounds. "Court cases leave no doubt that where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." O'Connor, J., joined by White, J. concurring in the result in part and dissenting in part. Id. at 2612.

The mandatory/substantive test has also been applied in a variety of state-created property cases. In Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982), the Court held that a state law which allowed employment discrimination claims to be brought against employers granted a protected property interest to the employee. Justice Blackmun, writing for the Court, stated that the claimant's "right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard..." 455 U.S. at 431. Both prongs of the mandatory/substantive test were satisfied. See also, Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) (Court found protected entitlement where public utilities could "terminate service only 'for cause'"); Goss v. Lopez, 419 U.S. 565 (1975) (state law mandated public education; each school had rules specifying grounds for suspension.)

Even where this Court has not explicitly used the mandatory/substantive rule, its decisions have been entirely consistent with this standard. In Vitek v. Jones, 445 U.S. 480 (1980), for example, the Court stated that prisoners have an "objective expectation, firmly fixed in state law and official penal complex practice that they will not be transferred unless they suffer from a mental disease or defect that could not be adequately treated in the prison." Id. at 489-490. The mandatory character of the statute plus the requisite finding of mental illness equals the mandatory/substantive test.

Even before Greenholtz was decided, the Court applied the mandatory/substantive rule. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court held that Nebraska's statute regarding good-time credit revocation created a protected liberty interest. "The State itself has not only provided a statutory right to good-time but also

specifies that it is to be forfeited only for serious misbehavior." 418 U.S. at 557. While the language of the statute actually says "in cases of flagrant or serious misconduct, the chief executive officer may order" good-time credits withheld, the Court logically deduced the mandatory character of this statute. Only if the prisoner met the standard of serious misbehavior would he be subject to losing the credits he had earned. Thus the Court used the mandatory/substantive rule to find that the prisoner has a protected liberty interest. See also, Enomoto v. Wright, 462 F.Supp. 397, 403 (N.D. Cal. 1976), aff'd mem, 434 U.S. 1052 (1978) (mandatory/substantive test applied to statutes governing transfers to maximum security).

The circuit courts have also followed the Supreme Court's mandatory/substantive test in assessing whether parole statutes create protected liberty interests. See, e.g., United States ex rel. Scott v.

Illinois Parole and Pardon Board, 669 F.2d 1185 (7th Cir. 1982); Parker v. Carrothers, 750 F.2d 653, 656 (8th Cir. 1984); Williams v. Missouri Board of Probation and Parole, 661 F.2d 697 (8th Cir. 1981), cert. denied, 455 U.S. 993 (1982); Bowles v. Tenant, 613 F.2d 776, 778 (9th Cir. 1981). Mayes v. Trammell, 751 F.2d 175 (6th Cir. 1984).

When the Court has not found a protected interest, it also has consistently applied the mandatory/substantive rule. For example, in Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), the Court examined Connecticut's commutation and pardon statute which authorized the Board of Pardons to commute sentences and to grant pardons. However, the statute contains "no definitions, no criteria, and no mandated 'shalls,' [and therefore] creates no analogous duty or constitutional entitlement." 452 U.S. at 466. The Court held that because there were "no explicit

standards by way of statute, regulation, or otherwise," that this case "contrast[ed] dramatically" with the Greenholtz mandatory/substantive test. Id. "[T]he decisionmaker is not required to base its decision on objective and defined criteria," but "can deny the requested relief for any constitutionally permissible reason of for no reason at all." Id. at 467, (Brennan, J. concurring). See also, Olim v. Wakinekona, 461 U.S. 238 (1983) (transfer to prison in another state did not implicate prisoner's liberty interests because statute did not contain substantive criteria); Meachum v. Fano, 427 U.S. 215, (1976) (transfer from medium security prison to maximum security prison did not implicate an inmate's liberty interest because statute contained no substantive standard); Montanye v. Haymes, 427 U.S. 236, (1976) (no liberty interest in transferring inmates from one correctional facility to another because statute

contained no substantive standard). In all of these cases the Court found no liberty interest based on the absence of the mandatory/substantive factors.

As applied to the present case, Montana's parole statute creates a protect ed liberty because it satisfies the mandatory/substantive test. The statute uses mandatory language - "shall" - and contains substantive standards - "detriment to the prisoner" and "the best interest of society." Allen v. Board of Pardons, 792 F.2d 1404, 1406 (9th Cir. 1986). Thus, this Court should affirm the Ninth Circuit's decision.

B. States Can Create Protected Liberty or Property Interests Using Language Other Than "Shall...Unless."

In seeking to reverse the Ninth Circuit's decision in this case, Petitioners claim that only the exact language used in Greenholtz --"shall...unless"-- creates a liberty interest. This Court has repeatedly found protected liberty and property

interests in statutes containing mandatory language and a substantive standard. However, this Court has never based its finding of liberty or property on the use of magic words. To do so would "exalt form over substance." Other linguistic formulations have created liberty and property interests. For example, in Hewitt v. Helms, the administrative segregation regulation used the words "shall," "must," and "will," but never used the word "unless." Nevertheless, the Court found a protected liberty interest based on the mandatory/substantive test. 458 U.S. at 471-472.

Similarly, in Vitek v. Jones, the statute allowing for transfer from a prison to a mental hospital used the word "may." The Court, however inferred that the statute meant may only, and held that a prisoner's right not to be transferred to a mental hospital was a protected liberty interest. 445 U.S. at 489-490. In Wolff v.

McDonnell the Court held that the statute, which used neither the magic words "shall" nor "unless," implicitly required a finding of serious misbehavior before good time credits could be rescinded, and thus created a protected liberty interest. 418 U.S. at 557. See also, Logan v. Zimmerman Brush, 455 U.S. at 431 (statute created a protected property interest, a cause of action, without using "shall" or "unless"); Memphis Light, Gas & Water Division v. Craft, 436 U.S. at 11 (Court found a protected property interest based on a state court decision which used neither "shall" nor "unless"); Goss v. Lopez, supra (state law creating property interest in public education used neither "shall" nor "unless"). Thus, this Court has rejected Petitioners' position that only the precise "shall...unless" formulation can create a protected liberty or property interest.

C. A Statute Which Contains a Subjective or Predictive Standard Nevertheless Creates a Protected Liberty or Property Interest If the Statute Satisfies the Mandatory/Substantive Test.

Petitioners seek to substantially modify or overturn Greenholtz in arguing that a statute does not create a protected liberty interest if the substantive standard is subjective and/or predictive. Petitioners' Brief at 11. This directly contradicts this Court's holding in Greenholtz, where the Court stated, "[t]he Parole Board's decision as defined by Nebraska's statute is necessarily subjective in part and predictive in part." 442 U.S. at 13. Whether or not a statute allows for subjective decision-making or for the making of predictions does not defeat a protected liberty or property interest. Nebraska's parole board can deny parole based on a prediction that the prisoner will not conform to his parole plan. However, that prisoner is still entitled to

a parole hearing and notice of why his parole was deferred.

In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court analyzed the two-part process of determining whether parole should be revoked. The first prong involved a historical review of the situation and the second prong "involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts ..." 408 U.S. at 479-480. The Court in Morrissey found that even though the parole revocation decision involved making a prediction, the statute created a liberty interest protected by due process. 442 U.S. at 13.

The Court has found protected liberty and property interests in many cases where the standards were subjective and predictive, so long as the statute contained both

mandatory language and some substantive standard. In Hewitt v. Helms, the administrative segregation statute included "specific substantive predicates" -"the need for control" or "the threat of a serious disturbance," 459 U.S. at 472. Both standards are subjective. Moreover, whether a prisoner should be segregated will depend in part on a prediction as to how he will act in the future. The Court acknowledged some of the possible reasons for segregation: "to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer." Id. at 468. The Court recognized the necessarily subjective and predictive nature of these decisions, but found a protected liberty interest because the statute satisfied the mandatory/substantive test.

Similarly, in Vitek v. Jones the statute required a psychiatrist's determination of mental illness before an inmate could be transferred to a mental hospital. That decision would necessarily include a subjective assessment of the prisoner's past acts, as well as predictions of his future behavior. 445 U.S. at 489-490. Even though the statute contained these subjective and predictive elements, the Court found a protected liberty interest in remaining in the general prison population. 445 U.S. at 491. See also, Wolff v. McDonnell, 418 U.S. at 557; ("flagrant or serious misconduct" necessary to revoke a prisoner's good-time credits); Logan V. Zimmerman Brush Co., 455 U.S. at 1155, ("for cause" standard).

In all of these cases the criteria were either subjective or predictive or both. Yet this Court found a protected liberty or property interest. Montana's standard of "reasonable probability that

the prisoner can be released without detriment to the prisoner or to the community," Mont. Code Ann. § 46-23-201(1) is no more subjective than "the need for control" in Hewitt or no more predictive than whether "continued correctional treatment...will substantially enhance his capacity to lead a law-abiding life when released at a later date," in Greenholtz, 442 U.S. at 11. Therefore, Petitioners' argument that Montana's statute is subjective and predictive and, thus, does not create a liberty interest must fail.

D. This Court Should Reject Petitioners' Attempt to Create a Special Standard for Determining Whether a Parole Statute Creates a Liberty Interest

Petitioners ask this Court to evaluate Montana's parole statute based on whether it contains the words "shall...unless" and whether it uses solely objective and historical standards. Since this is not the test which this Court has adopted for

evaluating every other form of liberty or property interest, Petitioners are effectively asking this Court to create a special standard for evaluating parole statutes. However, Petitioners have not demonstrated why there should be a special test for evaluating parole statutes. As argued above, this Court has not relied on the use of magic words nor on only objective, historical criteria in finding state-created liberty and property interests. The Court has explicitly and implicitly applied the mandatory/substantive rule in all of its liberty and property decisions. Petitioner has not explained why parole should have a special rule. Nor have petitioners explained why it should be more difficult for the Court to find a liberty interest in a parole statute than in an administrative segregation statute, Hewitt v. Helms, supra, or than in a statute pro hibiting

execution of the insane. Ford v. Wainwright, supra.

If the Court adopts a special rule for parole, there is no reason for not having hundreds of special rules for every case involving a state-created liberty or property interest. The mandatory/substantive rule, on the other hand, is one which federal and state lawmakers have used and should continue to use to gauge the due process implications of any statute or regulation. It is a clear, workable rule which the Court has consistently applied in case after case. Petitioner makes no argument why the Court should create a special rule in this case. Amicus curiae respectfully asks this Court to uphold the lower court's decision and all of its previous decisions regarding state-created liberty and property interests.

The Supreme Court has consistently applied the mandatory/substantive rule in a

variety of liberty and property cases. The Court has found a protected interest when the statute or regulation contained mandatory language and a substantive standard. The Court did not find an entitlement when the statute failed this test. The Court did not rely on whether the standard was subjective or objective; in fact, most statutes contain elements of both. Most statutes also include both historical review of facts as well as predictions of future behavior. Petitioners misinterpret Greenholtz in asserting that subjective and predictive decision-making is not subject to the Due Process Clause of the Fourteenth Amendment. Amicus curiae respectfully asks this Court to affirm the decision below and to find a protected liberty interest in Montana's parole statute because this statute satisfies the mandatory/substantive test.

II. THIS COURT SHOULD RECONSIDER ITS HOLDING IN GREENHOLTZ THAT A STATE DOES NOT CREATE A LIBERTY INTEREST WHENEVER IT CREATES A PAROLE SYSTEM.

In Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979), this Court held that the state's use of mandatory language coupled with a substantive standard served to create a liberty interest in Nebraska's parole statute. However, four of the present members of the Court would have gone beyond this holding to find that parole was a liberty interest protected by due process, no matter what language the state had used to create this interest. Justice Powell, concurring in part and dissenting in part, explained that: "I am convinced that the presence of a parole system is sufficient to create a liberty interest, protected by the Constitution, in the parole-release decision." 442 U.S. at 19. Justice Marshall, with whom Justice Brennan and Justice Stevens joined, dissenting in part

also supported this view: "[A]ll prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system." 442 U.S. at 22. Indeed, nothing in Greenholtz or in cases decided since then suggests that the only liberty interests which are protected by the Due Process Clause are those created by the language of state statutes. (See e.g. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 468 (1981)(J. White concurring). For the reasons which follow, amicus curiae asks this Court to reconsider its decision in Greenholtz and hold that, whenever a state creates a parole system, a prisoner who is eligible for parole under that system has a liberty interest in being release on parole which is protected by due process.

Amicus curiae asks this Court to hold that the question of whether a state has

created a liberty interest in parole should turn, not on the language used to describe parole, but on the entire structure of the state's sentencing laws. He asks this Court to hold that, in states like Montana which have elected to create a parole system, parole is an integral part of the entire sentencing process. Since this Court has consistently held that the right to an appropriate sentence is a liberty interest protected by due process, Hicks v. Oklahoma, 447 U.S. 346 (1980), this Court should also recognize that the right to parole is similarly protected. Such a result would in no way undercut this Court's holding that a state has no duty to create a parole system. Greenholtz, 442 U.S. at 7. Rather, it simply means that when a state decides to do so, the procedures for granting or denying parole must satisfy due process.

Parole is an integral part of sentencing because, under most sentencing schemes

which authorize parole, the period of time during which the parole board may grant parole constitutes a substantial part of the sentence. Thus, when the legislature creates a sentencing scheme, the only way that it can determine the effect of that scheme is to take into consideration the likelihood of parole under that scheme. The legislature must take this likelihood into consideration whether the purpose of sentencing is seen as punishment, rehabilitation, deterrence or the incapacitation of dangerous offenders. One cannot rationally determine whether a sentencing scheme will provide sufficient punishment, rehabilitation, deterrence or incapacitation unless one can determine what amount of time will actually be served by convicts under the entire sentencing scheme, including parole. Indeed, the legislature must also predict the amount of time which will actually be served in order to appropriate sufficient resources to house, feed, clothe, and pro-

vide other services to inmates. Of course, the legislature necessarily delegates discretion as to individual sentences to the sentencing judge and, in creating a parole system, to a parole board; but it must consider the effects of parole in evaluating the appropriateness of the overall scheme.

That parole must be seen as part of the entire sentencing scheme is demonstrated by the actions of states like Illinois which have abolished parole. In doing so Illinois simultaneously reduced the sentences which can be imposed for most crimes. For example, amicus curiae is governed by Illinois' former sentencing scheme which included parole. Under that scheme, there was no maximum sentencing which could be imposed upon those, like amicus, convicted for murder. Ill. Rev. Stat., ch. 38, § 1005-8-1(b)(1) (1977). Such defendants frequently received sentences in ex-

cess of 100 years. Amicus curiae for example was sentenced to 50 to 150 years. The effective length of this long sentence, however, has been reduced by the fact that amicus curiae is now eligible for parole since he has served more than ten years of his sentence. Ill. Rev. Stat., ch. 38, § 1003-3-3 (1977).

However, under the sentencing law which now exists in Illinois, the maximum sentence which can be imposed upon a person convicted of murder (without additional findings) is 40 years. Ill. Rev. Stat., ch. 38, §1005-8-1(a)(1) (1985). A defendant who receives this maximum sentence cannot be released until he has served nineteen years and 9 months. Ill. Rev. Stat., ch. 38, § 1003-6-3(a)(2),(3) (1985) (The defendant would be entitled to 20 years plus 90 days of good time credits). Thus, despite the fact that amicus curiae received a longer sentence under the old

law than is even possible under the new law, the fact that he was and remains eligible for parole under the old system means that his effective sentence is shorter than it would be under the new system. A similar pattern exists for other crimes. For example, those convicted of a class I felony have had their maximum period of confinement reduced to 7½ years from the prior law which set no maximum. Thus, this new sentencing scheme which was intended to increase the time spent in prison, actually reduced the maximum sentences which could be imposed on convicted defendants. Aspen, New Class X Sentencing Law: An Analysis, 66 Ill. B. J. 344, 347 (1977-78)("the principal thrust of Class X was to treat convicted felons more harshly."). The only way that one can make sense of these facts is to recognize that the legislature understood that the abolition of parole would more than compensate

for the reductions in nominal sentences imposed upon convicts. This was precisely the result in Illinois. Schiller, Illinois' New Sentencing Laws--the Effect on Sentencing in Cook County: Some Early Returns, 60 Chi. B. Assoc. Rec. 130-35 (1978-79). Thus, the fact that Illinois reduced its sentences and abolished parole at the same time suggests that parole is part of sentencing.

In most jurisdictions control over sentencing is largely vested in judges. No judge can exercise this considerable power responsibly without a working knowledge of the parole system. For example, amicus curiae's sentence of 50 to 150 years can only be understood in the context of a parole system which allows parole after 20 years, less credit for good behavior. Ill. Rev. Stat. ch. 38, §1003-3-3 (1977). Thus, in order to decide upon an appropriate sentence the judge must take the likelihood of parole into consideration.

The prosecutor and the defendant, directly or through counsel, also participate in the sentencing process. See, e.g., Ill. Rev. Stat. ch. 38, § 1005-4-1 (1985). Both sides must take parole into consideration in advocating for a desired sentence.

Finally, the above discussion envisions sentencing following a criminal trial. As this court has recognized, however, most criminal convictions are the result of guilty pleas. Boykin v. Alabama, 395 U.S. 238, 244 n.7 (1969). These pleas are frequently the result of plea bargains which include an agreed upon sentence. Whether the trial judge participates in the bargaining or is simply asked to approve a sentence agreed upon by the parties, nevertheless, judge, defendant and prosecutor must take into account not only the possibility of parole but also its likelihood.

That parole is in fact part of the sentencing process and not an act of

clemency, is also supported by the fact that courts have consistently held that a change in a state's parole scheme cannot, consistent with the constitutional prohibition against ex post facto litigation, be made retroactive. For example, in Weaver v. Graham, 450 U.S. 24 (1981), this Court held that a retroactive application of a statute which reduced the possibility of earning good time credits which could increase the potential punishment imposed upon the defendant and would thereby violate the ex post facto clause. That is because it could have the affect of lengthening the period of time before the prisoner was eligible for parole. Thus, this court has recognized that changes in eligibility for parole may increase the effective sentence served by a defendant. Since sentencing has been determined to be an integral part of the constitutionally protected criminal justice system, parole should also be pro-

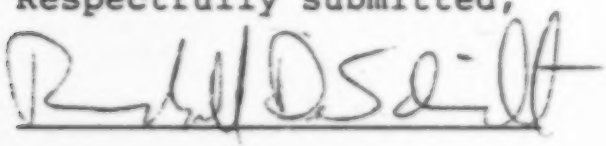
tected in those states which have decided to create a parole system.

In short, in those states which provide for parole, parole constitutes a decision by the legislature to take some of the sentencing power away from the trial judge and give it to another entity. Amicus curiae does not argue that the decision to transfer this power to another entity is in any manner improper or unconstitutional. Rather, he simply argues that this transfer of power should not deprive the convict of his right to due process in sentencing which would otherwise be his.

CONCLUSION

For the reasons mentioned above, this Court should affirm the lower court's decision in Allen v. Board of Pardons holding that Montana's parole statute created a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,



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January 20, 1987

Nina Mandel
Mandel Legal Aid Clinic
University of Chicago
1111 E. 60th Street
Chicago, IL 60637

Re: Board of Pardons v. Allen
No. 86-461

Dear Ms. Mandel:

On behalf of the respondents, I hereby consent to the filing of an amicus brief in the above case by you and your organization. Thank you for your interest in this case.

Sincerely yours,

Stephen L. Pevar

Stephen L. Pevar

SLP:cmd

Exhibit A

STATE
OF
MONTANA

ATTORNEY GENERAL
MIKE GREELY

JUSTICE BUILDING, 215 N. SANDERS, HELENA, MONTANA 59620
TELEPHONE (406) 444-2026

21 January 1987

Nina Mandel
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620 University Avenue
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Re: Board of Pardons, et al. v. George Allen, et al., No. 86-461

Dear Ms. Mandel:

Pursuant to S. Ct. R. 36.2 the petitioners consent to the appearance as amicus curiae of the Mandel Legal Aid Clinic of the University of Chicago Law School for the purpose of filing a brief on the merits herein.

Very truly yours,

CLAY R. SMITH
Assistant Attorney General

cc: Stephen L. Pevar
Jack Novik

Exhibit B